Recommendations and Reports of the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JANUARY 8, 1968—JUNE 30, 1970

VOLUME

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Recommendations and Reports of the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JANUARY 8, 1968—JUNE 30, 1970

VOLUME 1

726 Jackson Place - Washington, D.C. 20506

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FOREWORD

This is the first in a series of Reports that will publish the official Recommendations of the Administrative Conference of the United States, the research Reports in support thereof, and other important Conference documents.

The period January 8, 1968, when the Conference was first activated, through June 30, 1970, is covered in this volume. During this time, four Plenary Sessions were held and 22 official recommendations were adopted. This volume prints all official documents and the names of all persons who have served as members of the Conference during this period. The Appendix includes the enabling statute, the bylaws, and a list of all participating agencies, including an opinion determining those agencies to have statutory membership and those designated for membership by the President.

The 1969 Annual Report of the Administrative Conference contains a detailed discussion of its methods of operation and activities through December 31, 1969.

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*Succeeded Webster P. Maxon who resigned October 4, 1969 to become Executive Director, Federal Power Commission.

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INTRODUCTION

The Administrative Conference of the United States was established as a permanent, independent Federal agency in 1968. It is a sizable deliberative body composed of top-level Government officials and persons of national reputation in administrative law drawn on a part-time basis from private life. Its mission is to develop improvements in the Federal administrative process—that vast complex of formal and informal legal machinery which the Federal agencies use to carry out national policies and to determine the rights, privileges, and obligations of individual citizens and private businesses. The Conference is supported by a small permanent staff and by a number of legal scholars employed on a temporary basis, consisting mostly of professors of administrative law.

The Act provides that the Administrative Conference shall consist of not more than 91 nor less than 75 members, of whom not more than 36 may be appointed from the private sector. The Conference at present consists of 82 members: 11 Council Members (including the Chairman), 39 members from 33 Government agencies, and 32 from the private sector.

The Chairman is appointed by the President for a five-year term, with Senate confirmation. He is the only member who serves on a full-time, compensated basis. All other members, including the members of the Council of the Conference, the governing board appointed by the President, contribute their knowledge, experience, and services without compensation.

Some thirty departments and agencies conduct the bulk of administrative procedures affecting private rights. There is infinite variety to such proceedings. They range from the grant of a television license worth millions of dollars to the processing of applications for amateur or citizen band licenses; from the processing of an application to merge railroads of the magnitude of the New York Central and the Pennsylvania to authorizing truck transportation of a particular commodity over a particular route; or from the approval of a prospectus for a major new corporation to permitting cattle to graze on federal lands. Because of this steady flow of Federal agency determinations affecting our natural resources, transportation, power, finance, communications, commerce, securities, taxation, labor, credit, advertising, housing, veterans' benefits, the supply, quality, and price of food and fibers, public health, immigration, social welfare programs, drug control, and countless other areas of activity, the administrative process, in one way or another, continuously exerts its influence upon every citizen in his personal and business affairs. All citizens are vitally interested in how efficiently these agencies operate. The public seeks and is entitled to fair and expeditious action at minimum cost.

The statute grants to the Administrative Conference only the power to make recommendations. Full responsibility for the proper performance of agency functions remains with the agency heads. However, because officials from all of the major agencies are included in its membership, and because of the prestige of the total membership, it is contemplated that official recommendations of the Administrative Conference will be adopted in most instances where they are applicable. In addition, the Chairman is required by the Act to assist the agencies in putting recommendations into effect and to report at least once a year to Congress and to the President the recommendations made by the Conference and the extent of their implementation by the agencies.

In 1952 Mr. Justice Jackson observed: "The rise of administrative bodies probably has been the most significant legal trend of the last century . . . Perhaps more values today are affected by their decisions than by those of all the courts."

The publication of the official recommendations and reports of the Administrative Conference is designed to inform the public of proposed changes in agency procedures to make them fairer, less costly, and more expeditious. It is also the expectation of the Conference that such publication will stimulate the agencies and the public to continue to seek improvements in the procedures which are necessary to make our government work.

JERRE S. WILLIAMS,
Chairman.

MEMBERS OF THE CONFERENCE
(June 30, 1970)

CAROLYN E. AGGER, lawyer, Washington, D.C. Former attorney, Department of the Treasury, National Labor Relations Board.

C. PAUL BARKER, lawyer, New Orleans, La. Former attorney, National Labor Relations Board.

ST. JOHN BARRETT, Deputy General Counsel, Department of Health, Education, and Welfare.

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DONALD C. COOK, President, American Electric Power Co., Inc., New York, N.Y. Lawyer and former member of Securities and Exchange Commission.

ARTHUR H. COURSHON, chairman of board, Washington Federal Savings & Loan Association of Miami Beach, Miami Beach, Fla. Lawyer and former member of task force, Federal Home Loan Bank Board.

WILLIAM J. CURTIN, lawyer, Washington, D.C. Active in airline and trucking labor disputes.

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JOHN T. KOEHLER, lawyer, Washington, D.C. Former Assistant Secretary of Navy. Served also as Chairman, Maritime Administration, and as Chairman, Renegotiation Board.

JIM C. LANGDON, Chairman, Texas Railroad Commission. Austin, Tex. Former Chief Judge, Court of Civil Appeals, El Paso, Tex.

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Malcolm Mason, Associate General Counsel, Office of Economic Opportunity.

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David A. Nelson, General Counsel, Post Office Department.

Lenoard Niederlehner, Acting General Counsel, Department of Defense.

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Nathan Ostroff, Chairman, Appeals Board, Department of Commerce.

Max D. Paglin, Executive Director, Federal Communications Commission.

Samuel R. Pierce, Jr., lawyer, New York, N.Y. Former judge, Court of General Sessions, New York. Served also as Assistant to Under Secretary of Labor.

Edwin F. Rains, Deputy Commissioner of Customs, Department of the Treasury.

James T. Ramey, Commissioner, Atomic Energy Commission.

Emmette S. Redford, Ashbel Smith Professor of Government, University of Texas, Austin, Tex. Former advisor, Office of Price Administration, President's Committee on Government Organization and Bureau of the Budget.

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HOWARD WESTWOOD, lawyer, Washington, D.C. Active in Administrative Law and Legal Aid.

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PAUL RAND DIXON, member and former Chairman, Federal Trade Commission.

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ROBERT P. FORRESTAL, Assistant Secretary, Federal Reserve System.

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LEWIS B. HERSHEY (General), Director, Selective Service System.

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Daniel Steiner, General Counsel, Equal Employment Opportunity Commission.

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William L. Taylor, Staff Director, Commission on Civil Rights.

Edward Weinberg, Solicitor, Department of the Interior.

W. Edwin Youngblood, Hearing Examiner, National Labor Relations Board.

Lee C. White, Chairman, Federal Power Commission.

Philip F. Zeidman, General Counsel, Small Business Administration.

OFFICIAL RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES—AS OF JUNE 30, 1970

RECOMMENDATION NO. 1

ADEQUATE HEARING FACILITIES[1]

Administrative hearings of the Federal Government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement, and furnishings. At the present time no central body is responsible for providing or planning the needed facilities. As a particular consequence, administrative hearings often have been conducted in surroundings unsuitable to the seriousness of these governmental proceedings. The General Services Administration could advantageously arrange for the service and the space needed by departments and agencies in which administrative hearings occur.

RECOMMENDATION

1. The General Services Administration should develop a set of four hearing room classifications explicitly identifying the features required with standards meeting at least the following minimum requirements. Such classifications should be developed in conjunction with representatives of the agencies, the bar, and examiners. The minimum requirements should be:

Type A—A formal conference room with table space for as many as 16 principals and additional seating for up to 20 other persons.

Type B—A small hearing room with a raised dais, a witness box, a reporter's table, table space for as many as six counsel, and additional seating for up to 30 others. The design and furnishings should be appropriate to a hearing which is judicial in nature and should include wherever possible an auxiliary room in which counsel may confer with their clients, witnesses may be sequestered, etc.

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[1] Recommendations Nos. 1–8 were adopted December 10–11, 1968.

Type C—A large hearing room accommodating as many as 30 counsel at tables and up to 70 witnesses and spectators. This room should have the design and furnishings which are appropriate to formal hearings of a judicial nature.

Type D—An auditorium suitable for hearings of general public interest which might attract over 100 principals and spectators.

An essential requirement of each of the four types of hearing rooms should be a small, nearby room available to the examiner as his office and for such other uses as he designates.

2. The General Services Administration should prepare and maintain on a current basis an inventory which (*a*) identifies available hearing facilities throughout the country, classified under the system recommended in 1 above, including hearing rooms permanently assigned to particular agencies as well as courtrooms (local, State, and Federal), (*b*) identifies the GSA regional offices, local building managers, and others through whom such space can be obtained, and (*c*) provides information concerning the procedures to be followed to obtain space through the GSA for the conduct of hearings.

3. The General Services Administration should establish procedures for determining the frequency and location of administrative hearings which require facilities of each type within the system of classification recommended above in order to determine, by city, whether a permanent hearing room for multiagency use can be justified. A permanent hearing room should be considered justified wherever there is a continuing need of approximately one-fourth of the available working days.

4. The General Services Administration should provide for the administration and scheduling of permanent multiagency hearing facilities under the direction of GSA's Washington headquarters, but subject to such decentralization as the functions of inventorying, procuring, and planning may require.

5. The General Services Administration should establish a procedure for the systematic reporting, to the respective agency and to GSA, of deficiencies in assigned facilities discovered by presiding officers, and for the investigation and correction of such deficiencies.

6. The General Services Administration should establish an advisory committee of members of the bar and other interested professional associations, agency representatives, and members of the public to facilitate the evaluation of present and future needs and to report annually to the Administrative Conference on its activities.

7. Permanent multiagency hearing rooms and hearing rooms permanently assigned to individual Federal agencies should be identified as "Federal Administrative Hearing Rooms."

8. The Chairman of the Administrative Conference should encourage the cooperation of State and local judges in the procurement of courtroom space for Federal administrative hearings.

9. The Judicial Conference of the United States should encourage the cooperation of Federal judges in the procurement of courtroom space for Federal administrative hearings.

10. Federal agencies should budget funds to provide for the payment of charges for the use of appropriate space when such space is not available on a free basis.

11. Federal agencies which conduct administrative hearings should designate an official to work with the General Services Administration in the procurement and planning of hearing facilities.

RECOMMENDATION NO. 2

U.S. GOVERNMENT ORGANIZATION MANUAL

The manual at present falls short of its goal because the narrative text submitted by some of the agencies is outdated, unrevealing, cumbersome, or otherwise deficient. The text should be rewritten at a high level of competence.

RECOMMENDATION

1. Each agency covered by 5 U.S.C. 552 should assign the writing of material for the "U.S. Government Organization Manual" to an office having the competence to achieve the brevity, clarity, and general excellence of presentation required to serve the purpose of this handbook and to reflect credit on our government.

2. Included in the description of each agency should be information concerning the means by which more detailed knowledge of the agency's organization and functions may be obtained.

RECOMMENDATION NO. 3

PARALLEL TABLE OF STATUTORY AUTHORITIES AND RULES (2 CFR CH. I)

The Parallel Table of Statutory Authorities and Rules (2 CFR ch. I) should be an accurate and complete listing of United

States Code provisions cited as rulemaking authority in executive agency documents which prescribe general and permanent rules. The present Parallel Table is deficient. Agencies have not given sufficient time and attention to citing proper authorities and to keeping them current. Moreover, the Table's present method of preparation leads to omission of relevant references.

RECOMMENDATION

1. Each agency covered by 5 U.S.C. 552 should review all of its rules published in the Code of Federal Regulations to determine if the cited rulemaking authorities are complete, accurate, and current. The Conference requests that formal documents correcting deficient citations be submitted to the Office of the Federal Register for publication in the daily "Federal Register."

2. The Office of the Federal Register should take the steps necessary to broaden the coverage of the Table to include pertinent citations in preambles and in codified text as well as those in the formal statements of authority.

RECOMMENDATION NO. 4

CONSUMER BULLETIN

Most Americans are probably unaware of the multitude of day-to-day Federal activities reflected in proposed, revised, and recently promulgated rules, regulations, or determinations which substantially affect the price, quantity, quality, labeling, safety, and other aspects of products and services available to the public. A bulletin of general distribution containing an easily understood summary of current information about administrative activities in areas of consumer interest could serve a widespread public need which is not now met by the "Federal Register" or by agency and private publications of a more specialized nature.

RECOMMENDATION

1. A consumer bulletin should be established on an experimental basis. It should extract and paraphrase in popular terms the substance of Federal agency actions of significant interest to consumers. Initially, the bulletin should concentrate on items published in the "Federal Register," but as it gains public acceptance, it should be broadened to include materials secured

from other sources. It should indicate expressly that the bulletin does not constitute official notice of government action.

2. The Office of the Consumer Counsel in the Department of Justice appears at this time to be the agency best prepared to publish such a bulletin. If the bulletin were undertaken by that office, it could not only disseminate information, but also stimulate public response, thus aiding the effective discharge of the duties of the Consumer Counsel.

3. Initial circulation should include the press, consumer organizations, public and scholastic libraries, and individuals who request to be put on the mailing list. Format, subscription costs, frequency of publication, and related matters should be the subject of study during the experiment.

4. After a reasonable period of time, the effectiveness of and interest in the bulletin should be evaluated to determine whether it should be continued and, if so, in what form.

RECOMMENDATION NO. 5

REPRESENTATION OF THE POOR IN AGENCY RULEMAKING OF DIRECT CONSEQUENCE TO THEM

RECOMMENDATION

A. Agency Efforts

1. Federal agencies should engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. For this purpose, agencies should make strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings. The "rulemaking" referred to is that defined by the Administrative Procedure Act, § 2(c), 5 U.S.C. 551 (4) and (5).

2. Agencies should employ as many of the following procedures as are feasible, practicable, and necessary to assure their being fully informed concerning the relevant interests of the poor:

(a) Agencies should seek to inform the poor of all rulemaking proposals that may affect them substantially and should provide opportunities for the poor to submit their views concerning these and related proposals.

(b) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor substantially affected by contemplated rulemaking.

(c) Agencies should take care to invite individuals constituting a representative cross-section of the poor to submit their views orally or in writing as to proposed rules substantially affecting the poor.

(d) Agencies should conduct field surveys among the poor to discover their attitudes concerning particular government policymaking substantially affecting them.

(e) Agencies should use advisory committees made up of representatives of the poor as continuing consultants for all programs having a substantial effect on such persons.

(f) When necessary to assure adequate representation for the poor, agencies should pay the personal expenses and wage losses incurred by individuals incident to their participation in rulemaking hearings. Congress should support agency requests for funds and for authority, where none exists, to make discretionary payments for this purpose. Agencies already authorized to make such payments in whole or in part should use their existing authority and should allocate funds accordingly.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve doubts in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

In carrying out paragraphs 1 and 2 of this recommendation, agencies should consult with and coordinate their efforts with other Federal agencies having responsibilities in this area and should make maximum feasible use of the facilities of such other agencies for communicating with and obtaining expressions of the views of the poor.

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C. 553(a)(2) should not be applied with respect to rulemaking which may have a substantial impact on the poor.

B. PEOPLE'S COUNSEL

4. (a) An organization should be authorized by statute to employ a staff to act as "People's Counsel." The People's Counsel should represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor.

(b) The People's Counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in such Federal administrative rulemaking.

(c) The People's Counsel should be required to disseminate to all interested poor people's organizations pertinent information concerning rulemaking substantially affecting the poor.

(d) The People's Counsel should be authorized to participate suitably in its own name to represent the interests of the poor in any Federal agency proceedings in which the poor have a substantial interest.

(e) The People's Counsel should be authorized to provide representation for organizations and groups of the poor who seek judicial review of administrative action substantially affecting their interests. This recommendation is not to alter the kinds of agency action amenable to judicial review, the requirements of standing to seek review, or the scope of that review.

(f) As an incident to its main responsibilities the People's Counsel should be empowered to recommend to Congress or the President or to both such legislation or other action as it deems appropriate to correct deficiencies in or otherwise improve Federal programs having a substantial impact on the poor.

5. (a) Congress should provide for an appropriate body to perform the functions outlined in section 4. Deserving of consideration as such body would be a new single-purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Public Law 90–129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as the People's Counsel Corporation. In the event this form of organization is adopted, the following considerations should apply:

(1) The People's Counsel Corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the Corporation should be made deductible as charitable contributions for Federal income tax purposes.

(2) Federal financing of the Corporation should be made available to the extent necessary to assure its effective operation.

(3) The governing board of the People's Counsel Corporation should be constituted to give the poor meaningful representation thereon. Such body should be constituted to ensure close communication with the poor and effective representation of the viewpoints of the poor.

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an

opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that [such] notice and * * * [an opportunity for the People's Counsel to present its views] are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

Without prejudice to creating or empowering any other appropriate body to perform the general functions outlined in paragraphs 4, 5, and 6, any special provision therefor should be so structured as to take maximum advantage of the capabilities in this field of nongovernment organizations, and of other public bodies, including notably the Office of Economic Opportunity.

SEPARATE STATEMENTS [2] CONCERNING RECOMMENDATION NO. 5

Statement of John H. Crooker, Jr.

The majority position with respect to recommendation No. 5 is that "Federal agencies" should make strong efforts to ascertain from the poor their views regarding rulemaking "that may affect them substantially." I believe that (*a*) the major independent agencies are seldom involved in rulemaking affecting the poor except insofar as the poor are members of the public generally; and (*b*) it was the intent of the Congress, in establishing the Administrative Conference, to have studies conducted and information collected and interchanged, so that administrative agencies might improve and expedite their general procedures.

Therefore, I doubt that the Congress, in enacting section 5 of the Administrative Conference Act, 5 U.S.C. 574, intended that the Conference should address itself to the matters treated in recommendation No. 5. My dissent is not, in any way, directed to the wording of the recommendation.

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[2] Title 5, U.S.C., sec. 575(a)(1) provides, in part, as follows: "A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof."

Statement of Paul Rand Dixon

I disagree with the adoption of paragraphs 4, 5, and 6 of recommendation No. 5 developed by the Committee on Rulemaking respecting the creation of a People's Counsel to represent the poor generally before Federal administrative bodies. I am fully aware of and sympathetic with the plight of the poor in our society. I recognize it as one of the primary problems that must be solved if our democratic way is to survive. However, I am fully of the opinion that this is a problem that should be debated and resolved by Congress. I find nowhere in the legislative history leading to the creation of the Administrative Conference of the United States any thought that the Administrative Conference would delve into this social problem. Even if I could bring myself to the thought that it was rightfully within the purview of the duties of the Administrative Conference to deal with the plight of the poor, I still would question the wisdom of creating a Poor People's Counsel as the sole, if not principal, protector of the rights of the poor. The plight of the poor needs everyone's protection, not just the protection of a People's Counsel.

So that my position will not be misunderstood, I want it clearly known that I stand in the forefront of those who deem it necessary to do more to protect those low-income people in our society who are generally classified as poor.

Statement of Joe M. Kilgore, joined by Richard H. Keatinge; Jim C. Langdon; Norman A. Flaningam;[3] *Ross L. Malone; Starr Thomas; Harold L. Russell*

We did not support paragraph 4, 5, and 6 of the recommendation No. 5. We do support encouraging the formation of and recognition of a People's Counsel, as a private entity, to represent the public interest in the area of rulemaking in Federal agencies; with such Counsel being oriented to represent most fully those of the public whose interests would otherwise be unrepresented or underrepresented; and with such People's Counsel being eligible to receive Federal grants as required to permit its function.

This dissent from the majority view is dictated by:

1. The concern that this proposed function should be restricted, at least until experience might dictate otherwise, to the rulemaking function.

2. The belief that the proposed representation should not be

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[3] Mr. Flaningam joins in this statement noting that the term "rulemaking" as used herein refers to Federal agency processes for formulation, amendment, or repeal of rules of general applicability.

limited to any segment of the public, even though its principal thrust would be so directed.

Statement of Malcolm S. Mason

I support the purposes of this recommendation. When a People's Counsel is constituted, however, it is important to make a distinction between two kinds of advocacy, so different that they cannot be directly conducted by the same organization. There is first of all adversary advocacy, owing an attorney's complete loyalty to a specific client. In this sense, there cannot be a People's Counsel for the poor, because the poor are many and different and must be able to speak with many voices. This kind of advocacy is needed. It must be aggressive and hardhitting. If it is conducted directly by a Government or Government-controlled agency, its independence may be impaired. For this kind of advocacy an appropriate model is suggested by the Legal Services program conducted by many separate private local organizations: Funded by OEO, but free, and indeed encouraged, to act fully on behalf of an actual client without limiting its vigor by reason of relationship to OEO. This, I believe, will also be the pattern of the new HEW Legal Services program.

There is also cooperative advocacy: Unaggressive, quiet, nonadversary, seeking to foster an awareness, a concern and a more lively recognition that poor people are affected by proposed administrative action. This kind of advocacy can be conducted by a Government or quasi-Government organization without inconsistency and with benefit to the effectiveness of its work. An appropriate model is suggested by such accomplishments as new rules on loans to demonstration cooperatives of poor farmers (achieved by mutual agreement of the Department of Agriculture and OEO); new clarification of Government security regulations, removing barriers to the employment of hard-core unemployed with a criminal record (achieved by joint action of the Department of Defense, Department of Labor, and OEO); a new consensus on the wider use of policy advisory boards in programs affecting the poor (resulting in part from encouragement of this kind of action by OEO).

I urge that the Conference recommendation be implemented. In its implementation, contributions already made in this field should be recognized and used as a basis for expanded activity. The distinction between the two different types of advocacy should also be reflected in the choice of appropriate structure. Both are needed.

Statement of Nathaniel L. Nathanson

I would like to explain why I voted in favor of the recommendation for a People's Counsel, as amended during the debate, because I believe that my interpretation of the final action taken may have been shared by others who also voted in favor of the proposal and is therefore entitled to some consideration in efforts to secure its implementation.

While I was deeply troubled by some of the arguments advanced against the proposal, particularly by the misgivings expressed concerning the arrogance of a government agency or public corporation undertaking to determine the interests of the poor in particular agency action, I felt that this concern could be met by emphasis upon the representative character of the People's Counsel and a requirement that specific, identifiable interests be represented, rather than hypothetical interests which might be imagined by the People's Counsel. This requirement could appropriately be implemented by the further requirement that those interests be identified in the form of particular groups or associations who could determine their own interests and make their own wishes or basic positions known to the People's Counsel. This view was certainly made explicit in the amendment, proposed by the Judicial Review Committee and accepted by the Rulemaking Committee, to paragraph 4(e) and it is also consistent with the final language of paragraph 4(d) as amended in the course of the debate so as to substitute "participate suitably" for the original word "intervene." This left a large measure of discretion to each agency in allowing participation by the People's Counsel in a particular proceeding, including the requirement of a showing that the concern or position which the People's Counsel undertook to present was in fact shared by an identifiable group of people who were at least informed of the position which the People's Counsel was taking. I also doubt that the leaders of the poor people's movement who were quoted by Professor Bonfield as favorable to the proposal envisaged a People's Counsel who would not be in any way answerable to the people he undertook to represent.

I appreciate that this interpretation, emphasizing as it does the representation of identifiable groups who may exercise some control over the People's Counsel, may not be entirely acceptable to the original proponents of the proposal, particularly those who accepted the amendments with some reluctance. Nevertheless, they did accept the amendments, presumably for the purposes of mollifying the opposition and with some appreciation of the fact that the reasons for the amendments were more than technical. Particularly in view of the closeness of the vote on the final approval of paragraphs 4, 5, and 6, the original proponents are hardly now in a position to insist upon the rejection of a reasonable interpretation which may have been decisive in the approval of the recommendation. They may also take comfort in the fact that the current requirements for standing to participate in both administrative and judicial proceedings by groups indirectly affected by governmental action will scarcely inhibit the activities of a People's Counsel anxious and resourceful enough to find out what the people he purports to represent really want.

Statement of Robert W. Graham

May I respectfully record my dissent from the recommendations of the Conference embodied in paragraphs 4, 5, and 6 of recommendation No. 5. No one can disagree with the stated objectives of these recommendations, and I do not. However, I do not conceive that these recommendations are appropriate within the mission of the Administrative Conference in its efforts to seek improvement of administrative procedures. Furthermore, I consider unsound attempts to fractionate the public interest which is properly the concern of our Federal administrative agencies.

RECOMMENDATION NO. 6

DELEGATION OF FINAL DECISIONAL AUTHORITY SUBJECT TO DISCRETIONARY REVIEW BY THE AGENCY

RECOMMENDATION

1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

2. Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:

(a) Intermediate appellate boards

(1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:

(a) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,

(b) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

(c) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(d) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review by the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such applications for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has been afforded no opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for reconsideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of

any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(*b*) *Discretionary review of decisions of presiding officers*

(1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

> (a) A prejudicial procedural error was committed in the conduct of the proceeding, or
>
> (b) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

RECOMMENDATION NO. 7

ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW

RECOMMENDATION

Title 28 of the United States Code should be amended to eliminate any requirement of a minimum jurisdictional amount before U.S. district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law. This amendment is not to affect other limitations on the availability or scope of judicial review of Federal administrative action.

RECOMMENDATION NO. 8

JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS

RECOMMENDATION

Judicial review of orders of the Interstate Commerce Commission in cases where at present a special three-judge District court is used under 28 U.S.C. 2325 should be by petition to review in the U.S. Courts of Appeals in the same general manner as review of agency orders under the Judicial Review Act of 1950, 28 U.S.C. (Supp. II, 1967) 2341–2352.

RECOMMENDATION NO. 9

STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE[4]

The technical legal defense of sovereign immunity, which the Government may still use in some instances to block suits against it by its citizens regardless of the merit of their claims, has become in large measure unacceptable. Many years ago the United States by statute accepted legal responsibility for contractual liability and for various types of misconduct by its employees. The "doctrine of sovereign immunity" should be similarly limited where it blocks the right of citizens to challenge in courts the legality of acts of governmental administrators. To this end the Administrative Procedure Act should be amended.

RECOMMENDATION

1. Section 702 of title 5, United States Code (formerly section 10(a) of the Administrative Procedure Act), should be amended by adding the following at the end of the section:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial re-

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[4] Recommendations Nos. 9–17 were adopted October 21–22, 1969.

> view or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 703 of title 5, United States Code (formerly section 10(b) of the Administrative Procedure Act), should be amended by adding the following sentence after the first full sentence:

> If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

RECOMMENDATION NO. 10

JUDICIAL ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

RECOMMENDATION

The orders of most major independent regulatory agencies normally become enforceable automatically unless challenged in court. The statutory requirement that an order of the NLRB can be made effective only by affirmative action to obtain judicial confirmation of its terms, even when its validity is wholly uncontested, is contrary to efficient law enforcement. The Administrative Conference of 1961–62 urged that NLRB orders be treated, for purposes of judicial review, like those of the other major independent administrative agencies. That recommendation remains as sound today as when it was first made. The present practice burdens the courts with unnecessary proceedings whose only product is delay rather than added protection against ill-founded action. In the absence of any challenge after due notice to the parties, NLRB orders should be enforceable by the U.S. Courts of Appeals without further intermediate steps.

RECOMMENDATION NO. 11

PUBLICATION OF A "GUIDE TO FEDERAL REPORTING REQUIREMENTS"

Popular demand for the official index digest entitled "Guide to Record Retention Requirements" indicates that a companion piece covering the matter of Federal reporting requirements would serve a public need.

RECOMMENDATION

1. Each agency subject to chapter 35, title 44, United States Code, entitled "Coordination of Federal Reporting Services," should make separate digests of and citations to each statutory provision and each regulatory provision relied upon by the agency for the solicitation of information as contemplated by chapter 35.

2. After consultation with the Bureau of the Budget, the Director of the Federal Register should prescribe the style, coverage, and submission of such digests, and should publish the overall "Guide to Federal Reporting Requirements" in the Federal Register in the same manner used for the publication of the "Guide to Record Retention Requirements."

RECOMMENDATION NO. 12

ANALYTICAL SUBJECT-INDEXES TO SELECTED VOLUMES OF THE CODE OF FEDERAL REGULATIONS

Currently the Code of Federal Regulations is updated annually by the issuance of some 112 revised books. Many of these books are self-indexing. The usefulness of some books may be greatly impaired by the lack of an analytical subject index.

RECOMMENDATION

1. Each agency contributing substantially to the CFR should review its materials and (*a*) determine what books should include an analytical subject index, and (*b*) arrange for the preparation and publication of requisite indexes.

2. The Office of the Federal Register should review proffered indexes and arrange for the publication of those that appear to be professionally adequate.

RECOMMENDATION NO. 13

ELIMINATION OF DUPLICATIVE HEARINGS IN FAA SAFETY DE-CERTIFICATION CASES

RECOMMENDATION

The Federal Aviation Administrator has authority to revoke or suspend the licenses of aviation personnel and training facilities, airworthiness certificates, and other permits related to the operation of aircraft. Present procedures contemplate a full trial-type hearing, if one is desired by the respondent, before the Administrator issues an order of suspension or revocation. If an appeal is taken from that order, a second full hearing is afforded by the National Transportation Safety Board. This is wasteful of time and personnel, and is unnecessary as a protection of affected parties.

In order to expedite proceedings bearing directly on public safety, without sacrificing the interests of individual respondents, the Federal Aviation Administrator should discontinue providing hearings in the nature of trials in "certificate actions." This will not result in "punishment before trial," since the effective date of a certificate action order is invariably postponed, except in emergency situations, pending the outcome of proceedings before the National Transportation Safety Board.

RECOMMENDATION NO. 14

COMPILATION OF STATISTICS ON ADMINISTRATIVE PROCEEDINGS BY FEDERAL DEPARTMENTS AND AGENCIES

Government agencies which conduct formal or informal rulemaking proceedings or cases of adjudication which directly fix the rights and obligations of private persons (hereafter referred to as "proceedings")[5] owe a special duty to the individuals affected and to the general public to manage their caseloads as efficiently as possible, to eliminate inordinate delays in the conduct of proceedings, and to work continuously toward improving the fairness, effectiveness, and economy of their procedures. The present volume of Federal administrative proceedings is so great that much of the basic information needed in these efforts can be developed in intelligible and useful form only through statistical study. The compilation and publication of comprehensive statistics on Federal agency proceedings, at regular intervals would:

—Provide each agency with information concerning its business which would enable it to manage its caseload more effectively,

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[5] The agency compilations proposed by this recommendation should not be limited to formal proceedings, or indeed to "proceedings" as that term has been employed in gathering statistics for past conferences or Congressional groups. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests, including the routine handling of applications and claims.

—Augment generally the information concerning its activities which each agency must furnish to the President, the Congress, and the public,

—Afford affected parties and their counsel a better understanding of the administrative processes which determine their rights and obligations, and

—Provide a basis for specific study of particular agency procedures by the agency itself, by committees of Congress, the Administrative Conference of the United States, the organized bar, research scholars, and other individuals and organizations, public and private, interested in improving the Federal administrative process.

RECOMMENDATION

1. To the extent deemed useful to advance the purposes of this recommendation, each Federal administrative agency which conducts proceedings (as defined above) affecting private persons' rights, privileges or obligations, should prepare annual statistical data pertaining to those proceedings, to be compiled in such manner and presented in such publications as the agency considers appropriate.

2. These statistical compilations should list the kinds of proceedings pending during the year, with a concise yet meaningful description of the nature and purpose of each kind of proceeding and citations for the statutory authority under which the proceedings are conducted, and the sections of the Code of Federal Regulations which set forth the rules of practice governing each kind of proceeding.

3. For the purpose of agency efforts that may be made in cooperation with the Chairman of the Administrative Conference of the United States, to lessen delays in administrative proceedings, the statistical compilation should show the number of days which elapsed during each significant step of the proceedings which were concluded during the year.

4. In designing each agency's compilation, the following information, together with the time-study data referred to in 3 above, should be considered minimal:

(a) The number of proceedings of each kind pending at the beginning of the year;

(b) The number of new proceedings filed or otherwise commenced during the year;

(c) The number of proceedings concluded during the year and the manner of their disposition (i.e., by settlement, dismissal on procedural grounds, decision on the merits without hearing, final decision by agency after hearing, and an examiner's initial decision, etc.);

(d) The number of proceedings remaining at the end of the year; and

(e) The number of proceedings concluded during the year which were appealed to the courts.

5. Each agency should periodically analyze all of the information thus compiled and should develop improved techniques fitted to its particular needs to reduce delays and expense and otherwise to improve its administrative processes. A copy of this analysis should be submitted to the Administrative Conference of the United States.

6. In presenting its statistical compilation, each agency should summarize this analysis and describe the specific steps it has taken toward the ends referred to in 5 above.

7. Each agency, in its subsequent compilations, should follow a pattern that makes possible a comparison of data with corresponding data for earlier periods, thus reflecting changes in backlogs, volumes, and elapsed times and providing a measure of the agency's experience following the specific actions referred to in 6 above.

RECOMMENDATION NO. 15

CONSIDERATION OF ALTERNATIVES IN LICENSING PROCEDURES

Court decisions, notably *Scenic Hudson Preservation Conference* v. *FPC*[6] have emphasized that in licensing cases the Federal Power Commission must explore and give proper consideration to possible alternatives to the specific plan proposed by the applicant. This principle may in the future be applied to other licensing agencies. Since the range of possible alternatives in any case can be extensive and in some cases virtually unbounded, ways must be sought to control the scope and duration of licensing proceedings within manageable limits while meeting the requirements of the law.

RECOMMENDATION

Each agency which issues licenses, permits, or other forms of authorization, should seek to create procedures fitting its particular circumstances which will assure appropriate consideration of alternatives where necessary, and at the same time will permit effective administration of that agency's licensing functions.

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[6] 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). See also *Udall* v. *FPC*, 387 U.S. 428 (1967).

Because the various agencies must deal in their licensing procedures with many diverse subject matters, the Administrative Conference cannot specify a single rule and procedure for achieving this objective. Procedural techniques which experience has shown useful in analogous situations and which an agency might consider include: (1) Guidelines embodying a rule of reason concerning the number and character of alternatives to be considered in particular types of cases; (2) rules providing a point in time beyond which the issues in a proceeding will not be expanded to include additional alternatives except under compelling circumstances; (3) techniques, such as prehearing conferences and the filing of testimony in written form before trial, which tend to promote early identification of interested parties and important alternatives; and (4) placing responsibility upon the party or other person proposing an alternative to the applicant's proposal to make an appropriate threshold showing that the alternative deserves the agency's consideration.

RECOMMENDATION NO. [redacted] 69-8

ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS

RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.

RECOMMENDATION NO. 17

RECRUITMENT AND SELECTION OF HEARING EXAMINERS; CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND HEARING EXAMINERS; CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

RECOMMENDATION

A. Recruitment and Selection of Hearing Examiners

1. The Civil Service Commission should enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions by recognizing trial experience as one basis for qualification.

2. The Civil Service Commission should depart experimentally from the selective certification system as now practiced in the appointment of hearing examiners. Instead, it should develop a system under which the number of candidates qualified for hearing examiner positions is enlarged through the use of a general register for all agencies, with additional credit for specific relevant professional experience or selective certification for those agencies which demonstrate to the Civil Service Commission's satisfaction a current need for personnel possessing a specific background. The purpose of this experiment should be to permit meaningful comparative evaluation with the system now in effect.

A report should be made to the Administrative Conference after 3 years of experience.

To aid the Civil Service Commission in effectuating the objective of this part of the recommendation, the Chairman of the Administrative Conference should appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any agency as being required for its work. Present selective certification agreements should continue until new standards have been adopted by the Civil Service Commission.

3. The Civil Service Commission should study and, if practicable, should institute an experimental intern program to supplement the direct appointment of hearing examiners from the register. Without finally deciding the issue, the Conference urges the Commission to consider anew whether successful interns should automatically be placed in hearing examiner positions.

4. The Veterans Preference Act should be amended to permit the selection of examiners for each vacancy from the top 10 available persons then appearing on the register, determined on the basis of examination and ranking without reference to veterans preference.

B. Continuing Training for Government Attorneys and Examiners

1. Agencies employing attorneys and hearing examiners should encourage their participation in programs of continuing legal education. Budgets should include adequate funds for personnel so that attorneys and examiners may be released for reasonable periods of time to accomplish added training. Agencies should take all suitable steps to assure wide knowledge of training opportunities.

2. Agencies should also explore ways in which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

3. The feasibility of short-term exchange assignments of experienced attorneys in higher grades among agencies should be considered, in order to enhance the insight and effectiveness of government lawyers by exposing them to varied aspects of legal problems with which they may deal.

C. Creation of a Center for Continuing Legal Education in Government

1. A center should be established in the Washington area for the continuing legal education of Government lawyers, hearing examiners, and private attorneys practicing before Government agencies. The center should also promote coordinated programs within the Government and with specialized segments of the organized bar; stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education; and provide a mechanism for the exchange of information concerning professional problems of Government attorneys. The center, under the direction of lawyers, should be oriented toward applied legal problems. The Civil Service Commission should make available to it the benefit of the Commission's experience in establishing and operating Federal Executive institutes and centers. The Federal Administrative Justice Center proposed by the American Bar Association in a resolution adopted by the American Bar Association's House of Delegates in January 1969, as an example, would serve the purpose of the present recommendation.

2. The establishment of the Center should not diminish each agency's present responsibility to provide continuing legal education for its own lawyers through "in-house" training programs, but the Center should support and assist all agencies in maintaining these programs at a high level of effectiveness.

RECOMMENDATION NO. 18

PARTIES DEFENDANT[7]

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

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[7] Recommendations Nos. 18–22 were adopted June 2–3, 1970.

RECOMMENDATION

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules of Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

2. Congress should enact legislation:

   (a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them.

   (b) Amending section 1391(e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

   (c) Amending section 1391(e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which non-federal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

RECOMMENDATION NO. 19

SEC NO-ACTION LETTERS UNDER SECTION 4 OF THE SECURITIES ACT OF 1933

The following recommendations concern the process by which the Division of Corporation Finance of the Securities and Exchange Commission (the "Division") advises stockholders whether proposed sales of unregistered stock might involve a violation of the Securities Act of 1933 for which the Division would recommend Commission enforcement action. This no-action process is an outstanding example of administrative accessibility and pragmatism, enabling stockholders readily to determine whether a contemplated sales transaction may be consummated without registration. The recommendations are intended to enable the public and individual stockholders to be more fully advised of the interpretations, policies and precedents which guide the conclusions of the Commission and the staff, and to encourage the Commission to relieve its staff of the burden of routine no-action requests.

RECOMMENDATION

1. *Rule-Making.* The Commission acting under 5 U.S.C. § 553, should to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process. Where generalized rules are not feasible, the Commission should consider making rules limited to illustrative cases (involving either real or hypothetical facts) with an explanation of the reasons for their disposition. Existing summaries of past no-action letters, minutes of the Commission's disposition of those no-action requests which are brought before it, and related memoranda, insofar as they reflect current interpretative positions, should afford a strong and readily available foundation for such rule-making.

2. *Interpretative Releases.* Where the formal rulemaking recommended above may not be feasible, the Commission should to the maximum extent feasible make publicly available by the means of public releases its legal interpretations and policies, and standards guiding discretionary determinations.

3. *Past Interpretations.* On questions of law or policy which are not answered in formal rules or releases, a selected group of the more important past no-action letters which may have

continuing significance should be summarized and made publicly available.

4. *Routine Inquiries.* As the Commission's rules, releases and particular interpretations become publicly available, the Commission should consider instructing its staff to discontinue giving no-action letters on routine questions adequately answered by publicly available material.

5. *Future No-Action Letters.* The Commission and its staff should continue to issue no-action letters not excluded as routine under the limitation, suggested in No. 4. Each non-routine letter should, in detail or in summary form as deemed appropriate, state the facts and the reasons for the conclusion. Each letter should be made publicly available, subject to safeguards deemed appropriate under No. 6.

6. *Confidentiality and Time of Publication.* The Commission in making no-action letters publicly available should protect confidential information by the most effective and feasible means, including deletion, preparation of a "public" version of the letter, or reasonable delay in making the letter public. However, those letters which reflect significant developments in legal interpretation, policy or standards guiding discretion, should be published promptly, subject to the necessary protection of confidentiality.

7. *Procedural Regulations.* The present procedural regulations do not fully describe the no-action process and should be expanded to cover each step of the process.

Separate statement of Malcolm S. Mason

Government needs the art of making practical compromises between conflicting goals. There is a regrettable tendency to hold up administrative agencies to Olympian standards based on a theoretical pure strategy when a mixed strategy is called for. This operates to defeat the purpose of administrative procedure and the values to the public of administrative action. The Conference is hurrying too fast the process towards formalism which destroys both effectiveness and fairness. Every generation needs not only a measure of rational consistency but also the principle of Equity that stare decisis kills.

The Securities and Exchange Commission no-action letter is an outstanding creation in the field of administrative procedure by an agency that has been outstanding in its efforts to communicate its views to the public affected. The Conference believes that the Commission can do better and I agree it can, but the conference has proposed a solution which in my view makes sure that it will do worse.

The recommendation of the Conference if carried out will destroy the no-action letter for the valuable purpose for which it was created: quick, helpful, trustworthy guidance. If advice on particular matters must be accompanied by a public statement containing facts and reasons (as required by the Conference Recommendation, paragraph 5) and will be used as precedent, cautious statement and careful qualification is needed. The result will be that the staff will no longer dare to give the quick and informal advice and assurance that they are now authorized to give. The people who need the assistance will no longer get it. A new piece of bureaucratic red tape will be created. An existing effective and valuable informal procedure will be hurt. None of those who supported the recommendation intended this, but it will be the result. The Conference Recommendation does not reflect realistic consideration of how the no-action letter has operated in the past and how it will be likely to operate in the future.

RECOMMENDATION NO. 20

SUMMARY DECISION IN AGENCY ADJUDICATION

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

RECOMMENDATION

§ 1. Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for agency hearing may, after commencement of the proceeding and at least _____ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party may, within _____ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.

§ 2. The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§ 3. Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

§ 4. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

§ 5. The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (*review authority*) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.

RECOMMENDATION NO. 21

DISCOVERY IN AGENCY ADJUDICATION

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing Conferences*

The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions*

A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to

the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses*

(a) *Prior Statements*—At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

(b) *Narrative Summaries of Expected Testimony*—At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3(a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written Interrogatories to Parties*

(a) *Availability*—A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency*—Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

5. *Requests for Admissions*

(a) *Availability*—A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency*—Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of Documents and Tangible Things*

(a) *From Non-Parties*—A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties*—A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*—For the purposes of Recommendation 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*

(a) *Control over Discovery*—The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory Appeals*—Except as provided by Recommendation 2(6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*

(a) *Authority of Presiding Officer in General*—The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses*—The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera Proceedings*—The presiding officer should have the authority to permit a party or person seeking a protective order to make all of part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas*

The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by these Recommendations that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

RECOMMENDATION NO. 22

PRACTICES AND PROCEDURES UNDER THE RENEGOTIATION ACT OF 1951

RECOMMENDATION

1. *Criteria for Determining Excessive Profits*

The Renegotiation Board should publish in an appropriate form specific information describing the manner in which it applies each of the statutory factors. In the case of statutory factors for which the Board applies quantitative norms, a guide or statement specifically describing those norms should be published. In the case of statutory factors for which quantitative norms are not ordinarily applied, the Board should publish complete descriptions of the specific matters it has taken into account in its application of these statutory factors and the relative importance it has given to such matters. In both cases, the information to be provided should, insofar as practicable, be categorized by industry or other relevant grouping.

2. *Summaries of Facts and Reasons; Statements of Facts and Reasons*

The Renegotiation Board should improve the caliber of the Summary of Facts and Reasons and the Statement of Facts and Reasons furnished to a contractor. The Summary or Statement should contain a complete analysis and explanation of the manner in which the Board arrived at its determination and should reflect the data in the Board's files upon which it has relied. This could be readily accomplished if Summaries and Statements were principally based upon the internal reports and memoranda contained in the Board's files in each case. Information concerning third parties which otherwise would be privileged or confidential upon which the Board has relied in reaching a determination should be included in a Summary or Statement of Facts and Reasons if the information can be disclosed without impairing its proprietary value or identifying its source.

3. *Performance Reports*

The Renegotiation Board should make available, upon request of a contractor, all reports it has received from procurement agencies and other parties relating to the contractor's performance under contracts subject to renegotiation for the fiscal year under consideration. The Board should delete from such performance reports only those parts which either: (a) have been classified by the originating agency for reasons of national defense or foreign policy; or (b) contain information pertaining to third persons which is privileged or confidential and which federal law prohibits from being disclosed.

TEXT OF COMMITTEE REPORTS IN SUPPORT OF RECOMMENDATIONS NOS. 1–22 OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION NO. 1

ADEQUATE HEARING FACILITIES

Administrative hearings of the Federal Government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement and furnishings. At the present time no central body is responsible for providing or planning the needed facilities. As a particular consequence, administrative hearings often have been conducted in surroundings unsuitable to the seriousness of these governmental proceedings. The General Services Administration could advantageously arrange for the service and the space needed by departments and agencies in which administrative hearings occur.

RECOMMENDATION

1. The General Services Administration should develop a set of four hearing room classifications explicitly identifying the features required with standards meeting at least the following minimum requirements. Such classifications should be developed in conjunction with representatives of the agencies, the bar, and examiners. The minimum requirements should be:

Type A—A formal conference room with table space for as many as 16 principals and additional seating for up to 20 other persons.

Type B—A small hearing room with a raised dais, a witness box, a reporter's table, table space for as many as six counsel, and additional seating for up to 30 others. The design and furnishings should be appropriate to a hearing which is judicial in nature and should include wherever possible an auxiliary room in which counsel may confer with their clients, witnesses may be sequestered, etc.

Type C—A large hearing room accommodating as many as 30 counsel at tables and up to 70 witnesses and spectators. This room should have the design and furnishings which are appropriate to formal hearings of a judicial nature.

Type D—An auditorium suitable for hearings of general public interest which might attract over 100 principals and spectators.

An essential requirement of each of the four types of hearing rooms should be a small, nearby room available to the examiner as his office and for such other uses as he designates.

2. The General Services Administration should prepare and maintain on a current basis an inventory which (*a*) identifies available hearing facilities throughout the country, classified under the system recommended in 1 above, including hearing rooms permanently assigned to particular agencies as well as courtrooms (local, State, and Federal), (*b*) identifies the GSA regional offices, local building managers, and others through whom such space can be obtained, and (*c*) provides information concerning the procedures to be followed to obtain space through the GSA for the conduct of hearings.

3. The General Services Administration should establish procedures for determining the frequency and location of administrative hearings which require facilities of each type within the system of classification recommended above in order to determine, by city, whether a permanent hearing room for multiagency use can be justified. A permanent hearing room should be considered justified wherever there is a continuing need of approximately one-fourth of the available working days.

4. The General Services Administration should provide for the administration and scheduling of permanent multiagency hearing facilities under the direction of GSA's Washington headquarters, but subject to such decentralization as the functions of inventorying, procuring, and planning may require.

5. The General Services Administration should establish a procedure for the systematic reporting, to the respective agency and to GSA, of deficiencies in assigned facilities discovered by presiding officers, and for the investigation and correction of such deficiencies.

6. The General Services Administration should establish an advisory committee of members of the bar and other interested professional, associations, agency representatives, and members of the public to facilitate the evaluation of present and future needs and to report annually to the Administrative Conference on its activities.

7. Permanent multiagency hearing rooms and hearing rooms permanently assigned to individual Federal agencies should be identified as "Federal Administrative Hearing Rooms."

8. The Chairman of the Administrative Conference should encourage the cooperation of State and local judges in the procurement of courtroom space for Federal administrative hearings.

9. The Judicial Conference of the United States should encourage the cooperation of Federal judges in the procurement of courtroom space for Federal administrative hearings.

10. Federal agencies should budget funds to provide for the payment of charges for the use of appropriate space when such space is not available on a free basis.

11. Federal agencies which conduct administrative hearings should designate an official to work with the General Services Administration in the procurement and planning of hearing facilities.

REPORT OF THE COMMITTEE ON PERSONNEL IN SUPPORT OF RECOMMENDATION NO. 1

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The Committee on Personnel has been charged by the Administrative Conference of the United States with responsibility for conducting studies to determine how the professional skills and effectiveness of Government personnel can be enhanced.

The Committee chose as its first study the question of whether adequate hearing room facilities are available for Federal agencies and departments.

To determine the extent to which there is a present need for improved facilities, the Committee has conducted two surveys of agencies; held an informal meeting between the General Services Administration, the Committee, representatives of the agencies and departments, and representatives of the various professional and bar associations; and conducted two days of public hearings.

Responses to the agency surveys, comments at the informal meeting and numerous contacts with individual Examiners, lawyers and agency officers and testimony at the hearing reveal that for some agencies the inadequacies are chronic, disruptive and demeaning to the authority and effectiveness of the agency.

The complaints tend to be directed toward three general problems:

(a) a scarcity in some cities of suitable spaces;

(b) a procurement system that is unfamiliar, inefficient, misunderstood or cumbersome to employ; and

(c) a lack of understanding of the quasi-judicial character of many administrative proceedings and the need for a courtroom design for adversarial proceedings.

The problem of adequacy of hearing room space tends to be a problem of obtaining space in the field. On the whole, agencies report that their Washington spaces are adequate to very satisfactory and, to a much lesser degree, that spaces provided for hearings at their regional offices tend to be satisfactory. The agencies reporting the most extensive problems are those engaged in large numbers of field hearings, particularly:

Interstate Commerce Commission (FY 68)	1,693 field hearings
Department of the Interior (FY 68)	1,590 field hearings
National Labor Relations Board (FY 68)	3,100 field hearings
Social Security Administration (FY 68)	24,700 (est.) field hearings

That the problem may be only an occasional one for agencies normally holding their hearings in Washington or in regional offices does not diminish the significance of the particular occasion. The damage done to the parties and to the public interest when a major regulatory agency such as the Federal Power Commission is reduced to obviously inferior and makeshift facilities must seriously concern everyone who values or must rely upon the administrative process. That the Federal Power Commission only held five hearings outside of Washington in Fiscal Year 1968 does not diminish the importance of those five hearings.

The problem is not limited to agencies requiring hearing space in the smaller cities. Your committee has received complaints of difficulties resulting from inadequate hearing rooms, occurring within the last two years, in the following major cities: Columbus, Ohio; Dallas, Texas; Birmingham, Alabama; Miami, Florida; New Orleans, Louisiana; Seattle, Washington; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Norfolk, Virginia; Detroit, Michigan; Cincinnati, Ohio; and Houston, Texas.

With the construction of additional Federal office buildings, such as new facilities in Boston, the problem has been somewhat diminished in some cities. Approximately one quarter of the agencies responding to the survey indicated that the availability or the quality of space, or both, had improved perceptibly in the last several years. But this slight improvement may soon be overshadowed by a substantial expansion in the next few years in the use of hearings and by the increasing size of the crops of Examiners.

The General Services Administration, through its Planning and Utilization Division, is exceedingly interested in facilitating the procurement of space in Federal and non-Federal buildings throughout the country. The regional officers and local officers of the General Services Administration offer the agencies the advantage of a greater familiarity with local facilities than local agency representatives are likely to have. It offers the total administrative system the advantage of a single source of procurement, avoiding the harassment or confusion of local volunteers of space by appeals from a multiplicity of agencies.

The General Services Administration has indicated its willingness to provide permanent hearing room facilities in those cities where shared use by Federal agencies and departments would justify such assignment. The General Services Administration has indicated, also, that it would not apply the normal utilization minimum for justification of at least some use on at least 50% of the days, but would apply a more relaxed requirement similar to that used to evaluate the need for courtroom facilities. The G.S.A recognizes that the character of the use for such facilities makes constant use unlikely. For example, in its *Occupancy Guide* for G.S.A officers providing space for the Interstate Commerce Commission, G.S.A. notes, "Whenever a continuing need for hearing rooms approximates one-fourth of the available working days or more, a room suitable for conducting hearings should be provided and made available to the Commission on a permanent basis."

The agencies have not, however, made very great use of the procurement services of the General Services Administration. Only three agencies reported obtaining as much as 25% of their "outside Washington" hearing spaces through the General Services Administration. There appear to be three reasons for this:

(a) The agencies may believe that there simply is no space available, to G.S.A. or anyone else;

(b) The agencies may have found the G.S.A procedures inconvenient, cumbersome or unproductive in the past, and/or feel that their examiners can more readily obtain space through the local bar or local agency representatives; or

(c) The agencies may feel that G.S.A. representatives do not understand the quasi-judicial character of the proceedings and cannot be relied upon to obtain appropriate space.

Much of the shopping about for space appears to be impelled by policies prohibiting the expenditure of funds upon hearing spaces when free space can be obtained. While a reasonable search for free space may promote the better utilization of Federal and state facilities, the direct money savings should not be allowed to force agencies into improvised or demeaning spaces that compromise the integrity of the proceeding and the dignity of the process. The picture painted by complaints received by your Committee of Examiners forced into crowded basement rooms, Civil Service examination rooms complete with blackboards and school desks, storage rooms, minimally furnished conference rooms, etc., makes a sad spectacle of the Federal administrative process.

It is important to recognize that the words "hearing room" do not mean the same to every agency, Examiner or General Services Administration representative. In their survey responses, agencies indicated individual variations as to the exact features needed in their hearing spaces. The following five types of spaces with total hearing room days of occupancy for Fiscal Year 1968 for all responding agencies indicate the most general types of spaces required by the agencies:

Type A—A formal conference room with table space for up to 16 principals and additional seating for up to 20 others. (Days of use: In Washington, 208; in the field, 13,806. Principal user: Office of Economic Opportunity, 13,465 field hearings.)

Type B—A small hearing room with a raised dais, a witness box, a reporter's table, table space for up to 6 counsel and additional seating for up to 30 others. The design and furnishings would be those appropriate to a small courtroom. (Days of use: In Washington, 450; in the field, 379.)

Type C—A room identical to Type B but with additional auxiliary rooms, normally an office for the Examiner or for the use of counsel and a room for sequestering witnesses. (Days in use: In Washington, 1,128; in the field, 17,649. Principal users: In the field, N.L.R.B. with 3,450 adversarial hearings and 1,960 representation proceedings, and Health, Education and Welfare with 12,000 (est.).)

The N.L.R.B. reports a need for a third auxiliary room in its adversarial hearings.

Type D—A large hearing room accommodating up to 30 counsel at tables and up to 70 witnesses and spectators. This room, too, would be designed and furnished in the style of a courtroom, but would not provide auxiliary rooms. (Days of use: In Washington, 648; in the field, 54.)

Type E—An auditorium appropriate for large proceedings which might attract over 100 parties, spectators, etc. (Days of use: In Washington, 64; in the field, 107.)

Two comments should be made in regard to this data. First, the data is based upon approximations and estimates of agencies as to what would have been the appropriate facility. Thus, an N.L.R.B. hearing actually held in a conference room, but for which the agency feels a TYPE C facility was needed, was counted under Type C. Second, this data is based upon 23 agencies responding as of November 1, 1968. The data should not be used, therefore, to evaluate the justification for the permanent assignment of field facilities, but should be used to obtain some idea of the relative demand among the various types of space.

This differentiation as to type of facility immediately suggests the need for two steps to optimize the procurement procedure. First, there is a need for a detailed inventory of available spaces by type. Second, there is a need for the formulation of explicit specifications by type so that those providing space, those procuring space, and those requesting space may reliably refer to the same type of hearing room. A step in this direction has already been accomplished by the preparation by the General Services Administration of *Occupancy Guides,* in which general hearing room requirements of a specific agency are described for the regional offices of G.S.A. The G.S.A. has indicated that they intend "to continue the study of your requirements and to further improve this Guide whenever possible," so such a step conforms to G.S.A.'s own interest in specification of standards. The *Occupancy Guide* descriptions are at present somewhat vague. There is not sufficient detail to give a regional officer of G.S.A. an idea of the quasi-judicial atmosphere that is required, of the particular need for the Examiner to see and hear the witness easily, of the need for a separation of the witness to impress upon him the significance of his participation and testimony, of the table space requirements of counsel and expert witnesses in complicated, economic proceedings, or of the many other requirements peculiar to an administrative hearing that agencies engaged in general conferences or meetings do not have. It is clear that many of the spaces offered, accepted and then found inadequate by Examiners would not have been considered had all parties fully understood the particular requirements of an adversarial hearing on the one hand and the particular characteristics of the space being offered on the other. A set of explicit specifications would reduce the incidence of such misunderstandings.

A recurring concern of the agencies and of the Examiners is that the quasi-judicial character of the administrative hearing be recognized and weighed in the definition of *appropriate space.* To this end, it has been repeatedly suggested to the Committee that it would be helpful in fixing the appropriate image in the minds of administrative officers and other laymen involved in the procurement of space if the hearing rooms were specifically labeled "Administrative Courtroom." Although of minimal cost, such a step would appear to be useful in establishing the character of the proceeding.

The Committee found especially significant the support which the bar and professional associations provided the agencies and Examiners in their efforts to obtain more appropriate hearing spaces. The Hearing Examiner Committee of the Administrative Law Section of the American Bar Association has approved the standards unanimously adopted by the Federal Trial Examiners Conference in May, 1968, and has approved a resolution on this topic for submission to the Section Council. See Attachment A. The Federal Trial Examiners Conference standards are attached as Attachment B. The Federal Bar Association Committee has indicated its strong support, as have other bar associations.

The Committee has received several reports that complaints have been made to N.L.R.B. Examiners by counsel objecting to having hearings in N.L.R.B. spaces. An inquiry was therefore directed to other agencies to determine whether there had been other instances of such complaints, directed at improprieties or the appearance of undesirable ex parte contacts between Examiners and staff attorneys. Although nineteen other agencies reported conducting hearings in or immediately adjacent to their offices, no other agency reported receiving such complaints. Only two others indicated a belief that a physical separation would be desirable or necessary. A number of the agencies volunteered the observation that the accessibility of such an arrangement was important to the efficient conduct of agency business, and one indicated that industry counsel appeared to prefer the arrangement. At the informal meeting arranged by the Committee, several participants indicated that when possible their agencies made a positive attempt to separate hearings from their office spaces, but this was not reflected in the survey responses. This is a matter that can probably be best determined by each agency for itself. Certainly no general rule can be imposed without risking serious interference with agency efficiency and there is no evidence that a general rule is needed or would be practical.

Of fifteen agencies responding to a survey item inquiring whether they had any formal reporting procedure for the continuing evaluation of the adequacy of hearing rooms, only one agency said that it had such a procedure, the Interstate Commerce Commission. The form utilized for this purpose by the Interstate Commerce Commission is herewith attached as Attachment D. A device for collecting specific reports of deficiencies in facilities might well be more widely used to inform both the agencies and the General Services Administration. The representative of the General Services Administration indicated at the informal meeting arranged by your Committee that it would very much like to have the regular feedback of information as to problems encountered by administrative agencies in arranging for hearing rooms.

The procedures by which agencies obtain information as to the availability of space vary from agency to agency. Most agencies rely most heavily upon their field officers. The Federal Trade Commission, for example, works from lists compiled by its field offices and from the *Register Department of Justice and the Courts of the United States.* The Interstate Commerce Commission assigns responsibility to the Office of the Secretary, Section of Records and Service, which works from a list of Federal facilities available by cities in each ICC Region. In some cases agencies go to the General Services Administration with a request for a specific courtroom or hearing room, sometimes with a general request for space. Most commonly, however, the agency or Examiner goes directly to the managers of identified space and negotiates directly with them for the use of the space. This bypassing of the General Services Administration is regarded by several agencies as more efficient and reliable, but it may reduce G.S.A.'s awareness of the agency's need and it may fail to develop for the agency information as to the full range of space available in a particular city.

When each agency was asked if the agency would be interested in participation in a permanent space committee of agency representatives, GSA officials, and members of the administrative bar to overview the hearing facilities problem, approximately half indicated that they would not. Approximately half indicated that they would. The Committee feels that such an advisory committee would prove useful to G.S.A. and the participating agencies.

Approximately half of the agencies indicated that they had space permanently assigned in Washington or in field locations or both for their exclusive use as hearing rooms. These agencies indicated that such spaces were heavily utilized and that it was normally impracticable for them to be made available to other agencies on a regular basis. When such space is free, however, it should be made available to other agencies for non-conflicting use.

ATTACHMENT A

RESOLUTION

Whereas, by resolution of the Board of Governors of the American Bar Association, as approved by its House of Delegates, the Section of Administrative Law has been directed, on behalf of the Association, by all necessary and proper means, to preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, and

Whereas one of the objectives of the Administrative Procedure Act was and is to improve and enhance the standing and stature of Hearing Examiners, and

Whereas the Council of the Section of Administrative Law is concerned with the physical conditions under which Hearing Examiners perform their duties and believers that the facilities afforded to them have a direct bearing on their standing and stature, whether such facilities be viewed by agency personnel or the public,

Now therefore be it

Resolved that the Section of Administrative Law urges the Federal Government to provide Hearing Examiners with office facilities and supporting personnel suitable to the discharge of their judicial function and at least equivalent to those of professional legal personnel of like Civil Service Grade within the same agency and which assure requisite privacy and confidentiality, and

Resolved further that the Section of Administration Law indorses in principle the "Standards for Federal Hearing Examiner Office Space, Equipment, Supplies, Facilities and Staff" adopted by the Federal Trial Examiners Conference on March 7, 1968, to the extent they refer to the foregoing, and

Resolved further that the Hearing Examiners Committee be assigned responsibility for conveying these views to any Government department or agency which fails to provide Hearing Examiners with accommodations consistent with these standards.

ATTACHMENT B

HEARING FACILITIES REQUIRED FOR FEDERAL ADMINISTRATIVE PROCEEDINGS

(Standards Adopted by Federal Trial Examiners Conference, May 1968)

I. GENERAL GUIDING PRINCIPLES

A. Nature of facilities should be commensurate with type of proceeding.

1. Courtrooms for trial of all adversary proceedings.

(a) Courtroom and accessory facilities should be that of, or equivalent to that of, United States District Court or highest State court of original (i.e., trial) jurisdiction.

(b) Courtroom of U.S. Referee in Bankruptcy is adequate in those cases where it in fact provides facilities reasonably sufficient for the number of counsel and witnesses.

(c) Auxiliary courtrooms (or Federal Administrative Courtrooms)—if feasible, with the facilities usually connected therewith (e.g., private office, counsel room, and witnesses room)—should be provided in all Federal buildings and courthouses wherever possible, for use by Federal Trial Examiners when courtrooms of United States District Court and Referee in Bankruptcy are not available.

2. Small court or conference rooms for nonadversary proceedings.

(a) Adequate in size, considering needs of counsel (if any) and the number of witnesses.

(b) Should ensure impression that a formal Government proceeding is being conducted.

(c) Must not reflect discredit upon the U.S. Government or place the Federal administrative process in disrepute.

B. Except at an agency's headquarters, trial of administrative proceedings should not be conducted in premises of the agency.

C. Procurement of courtrooms for trial of Federal administrative proceedings should be the responsibility of General Services Administration. The cooperation of the Administrative Office of the United States Court and the Department of Justice should be obtained in the implementation by General Services Administration of these Standards.

D. Responsibility within the agency itself for ensuring compliance with these Standards should be lodged in the agency's Chief or senior Trial Examiner, and not in investigating, prosecuting, administrative, or other personnel of agency.

II. SPECIFICATIONS FOR FEDERAL ADMINISTRATIVE COURTROOM FACILITIES

A. *Existing Federal Facilities (Non-Agency)*

1. Where Federal courtrooms are not in use for judicial proceedings, they should routinely be made available, upon request, for use by Federal Trial Examiners for adversary Federal administrative trials.

2. Where Federal courtrooms are not available, General Services Administration should provide (by lease or otherwise) for use of State, county, or local courtrooms and accessory facilities.

3. Order of preference:

(a) Courtroom of United States District Court.

(b) Courtroom of U.S. Referee in Bankruptcy (or, when provided, Auxiliary Courtroom or Federal Administrative Courtroom).

(c) Courtroom of State court of highest original (i.e., trial) jurisdiction.

(d) County courtroom.

(e) Local (e.g., city) courtroom.

4. Facilities normally available to trial court judge (private office and lavatory) should routinely be made available to the Federal Trial Examiner together with the courtroom.

5. Federal Trial Examiners should be charged with enforcement of rules of decorum (e.g., no smoking) locally applicable to the particular facilities.

6. When constructing or furnishing Auxiliary Courtrooms of Federal Administrative Courtrooms in existing Federal Buildings, Federal Courthouses, and Post Office Buildings, the courtrooms should be the same as or comparable to the United States District Courtroom, except the spec-

tator section may be smaller. All other facilities normally connected with District Courtroom (office with private lavatory, counsel room, and witnesses room) should be provided.

B. *Federal Facilities (Non-Agency) under Construction or Projected*—All planned or projected new Federal building facilities, as well as those where space is available, housing a Federal courtroom (and also those not housing a Federal courtroom, where space is available and a need for regular use exists)—e.g., Federal Courthouses, Federal Buildings, Federal Complexes, Federal Centers, Post Office Buildings—should contain one or more Auxiliary Courtrooms or Federal Administrative Courtrooms, approximately equivalent to United States District Courtrooms, except the spectator section may be smaller; including, as part thereof, a private office with lavatory for the Federal Trial Examiner, a counsel room, a witnesses room.

Note: In this connection, see, e.g., "Symposium" Courthouses and Courtrooms," *Judicature* (Journal of the American Judicature Society), October–November 1966, for examples of modern courtroom design.

C. *Agency Facilities*

1. Except at an agency's headquarters, adversary Federal administrative trials should not be conducted on the premises of the agency itself, unless absolutely essential *because no other facility is available.*

2. In those instances where adversary Federal administrative trials cannot be conducted elsewhere, the trial facilities shall in all cases comply with acceptable operational standards (e.g., bench on dais, proper Reporter's facilities, witness box or chair at a reasonable distance from the Federal Trial Examiner and counsel, counsel tables of adequate size, adequate space and configuration of furniture to permit note-taking and consultation with clients and witnesses, and private office for the Federal Trial Examiner).

RECOMMENDATION NO. 2

U.S. GOVERNMENT ORGANIZATION MANUAL

The manual at present falls short of its goal because the narrative text submitted by some of the agencies is outdated, unrevealing, cumbersome, or otherwise deficient. The text should be rewritten at a high level of competence.

RECOMMENDATION

1. Each agency covered by 5 U.S.C. 552 should assign the writing of material for the "U.S. Government Organization Manual" to an office having the competence to achieve the brevity, clarity, and general excellence of presentation required to serve the purpose of this handbook and to reflect credit on our government.

2. Included in the description of each agency should be information concerning the means by which more detailed knowledge of the agency's organization and functions may be obtained.

REPORT OF THE COMMITTEE ON INFORMATION, EDUCATION, AND REPORTS IN SUPPORT OF RECOMMENDATION NO. 2

The Committee on Information, Education, and Reports submits that the *U.S. Government Organization Manual* should be a compact reference handbook designed to guide the user to effective initial contact with out Federal government, and that this *Manual* should, by the excellence of its presentation, reflect credit on the government and the Republic. Consonant with the accompanying report your Committee finds that the *Manual* cannot achieve these high standards under present procedures; that the principal faults lie in the narrative text submitted by the agencies; and that correction of these faults will require rewriting the text at the highest level of competence afforded by the submitting agency.

I. BACKGROUND

The "Daily Revised Manual of Emergency Agencies and Facilities" of 1934, forerunner of the present *United States Government Organization Manual*, was limited to the activities of New Deal agencies. The format was broadened later to provide information on all phases of Government organization and activities. The *Manual* sought to meet the needs of libraries as a part of their basic reference works in Government; of colleges, universities, and secondary schools as textbooks or as corollary reading; of legal and professional groups, and of Federal agencies, for use of their personnel.

For a considerable period after its creation the *Manual* was a model Baedeker. Clearly written, compact, and well organized, it served the needs of citizens seeking help in threading the bureaucratic maze. But though updated annually it was never revised, and it gradually lost the qualities that had made it excellent. Subjected to frequent, piecemeal amendments, the product of a generation of ever-changing agency writers who borrowed more and more heavily from job descriptions and other papers intended for internal agency use, the *Manual* became more difficult to use.

Today it is foundering in a polysyllabic sea of Federal prose—

a handbook that is no longer handy, a guidebook in need of a guide. Unless means are found to reverse present trends, the *Manual* will continue to sink into a state of increasingly limited usefulness.

II. FINDINGS

The Committee on Information, Education, and Reports believes that the time has come for complete revision of much of the text, for rewriting "from scratch" of the descriptions of many of the older agencies.

The *Manual* is neither a directory nor an internal management manual. In its ideal form, it should provide basic information on the organization and functions of all agencies with emphasis on bureaus or divisions with which members of the public can be expected to deal.

This goal demands brevity and simplicity. The user should not be subjected to extraneous matter couched in job-sheet language and paragraph-long sentences (see for example pages 67, 92, 134, 135, 194, 369 of the 1968–1969 edition). Material relating to the internal operations of agencies such as that on page 106 should be eliminated, thereby giving needed space for the inclusion of more newly created governmental units without swelling the *Manual* to cumbersome size. Descriptions of offices dealing with management, data processing, etc., abound in the *Manual* (see pages 92, 93, 106, 116, 182–184, 243, 297, 393, 476, 477, 548, 569). The space devoted to such units should be greatly reduced or eliminated entirely.

The usefulness of the *Manual* would be further increased if the oldline departments would follow a uniform pattern of confining the narrative text to descriptions of the operating bureaus and divisions where programs vis-a-vis the public are actually carried out. Space allotted to outlining the responsibilities of Under Secretaries, Assistant Secretaries, and other individuals results in unnecessary repetition and confusion (e.g. pages 133, 242, 302, 303, 353). Personnel listings and organization charts illustrate adequately a department's lines of authority.

III. CONCLUSIONS

The gradual deterioration of the *Manual* has taken place in spite of efforts on the part of the editors to rejuvenate it. The limited but able Federal Register staff has prepared a "Handbook on Document Drafting" Chapter II of which is entitled "How to Prepare Manuscript for the U.S. Government Organization Manual." This material is used in training sessions for agency personnel and the pertinent text is distributed each year as work on a new edition of the *Manual* begins. But at best these actions have merely retarded the rate of decline.

The problem in its simplest terms is one of leadership within the contributing agencies. In a period characterized by ever greater emphasis on the public's right to know, many agencies have been unwilling to assign top talent to the *Manual*, despite substantial expenditures for information functions.

More often than not the work has been delegated to subordinate personnel or used as a training medium for new employees at the entrance grade. There is an understandable hesitancy on the part of such employees to see the problem from the public's point of view and to delete or reduce material which is of importance chiefly within the agency.

Under present conditions it is difficult, possibly even unfair, for the Federal Register editors working on the *Manual* to demand that some agencies limit the length of new material—which may be valuable—because others jealously retain space for years to describe obsolescent functions or to trace the history of present operations.

The experience of many years has convinced the Federal Register staff that the drafting of concise and informative statements of agency functions, projects, programs, and services should be the work of qualified agency staff members—employees at the highest level of competence, fully clothed with authority to act. The Committee on Information, Education, and Reports concurs in this conviction.

RECOMMENDATION NO. 3

PARALLEL TABLE OF STATUTORY AUTHORITIES AND RULES (2 CFR CH. I).

The Parallel Table of Statutory Authorities and Rules (2 CFR ch. I) should be an accurate and complete listing of United States Code provisions cited as rulemaking authority in executive agency documents which prescribe general and permanent rules. The present Parallel Table is deficient. Agencies have not given sufficient time and attention to citing proper authorities and to keeping them current. Moreover, the Table's present method of preparation leads to omission of relevant references.

RECOMMENDATION

1. Each agency covered by 5 U.S.C. 552 should review all of its rules published in the Code of Federal Regulations to determine if the cited rulemaking authorities are complete, accurate, and current. The Conference requests that formal documents correcting deficient citations be submitted to the Office of the Federal Register for publication in the daily "Federal Register."

2. The Office of the Federal Register should take the steps necessary to broaden the coverage of the Table to include pertinent citations in preambles and in codified text as well as those in the formal statements of authority.

REPORT OF THE COMMITTEE ON INFORMATION, EDUCATION, AND REPORTS IN SUPPORT OF RECOMMENDATION NO. 3

The Committee on Information, Education, and Reports submits that the Parallel Table of Statutory Authorities and Rules (2 CFR Ch. I) should be an accurate and complete listing of United States Code provisions cited as rule-making authority in Executive agency documents which prescribe general and permanent rules. The Committee finds that the Parallel Table is deficient as an accurate and dependable finding aid because (1) agencies have not given sufficient time and attention to citing proper authorities and to keeping them current; and (2) the Table's coverage is not broad enough to include useful citations now lost under present methods of preparation.

I. BACKGROUND

The Parallel Table was originally designed to lead the legal researcher from the enabling act in his hand to the resultant reglation in the Code of Federal Regulations. The Table is based on the requirement of the Administrative Committee of the Federal Register that every agency rule must be covered by a citation to the authority under which the provisions are issued, which reads as follows:

> § 17.45 *General requirements.*
>
> Each section in a document subject to codification shall include, or shall be covered by, a complete citation of the rule-making authority under which the provisions of the section are issued, including (a) general rule-making authority delegated by statute, (b) specific rule-making authority, if any, delegated by statute, and (c) executive delegations, if any, necessary to link the statutory authority to the issuing agency.

In the early days of the Federal Register when agency writers and their counsel were just learning how to draft Federal Register documents, the Federal Register Office employed a staff of attorneys whose primary function consisted of reviewing agency documents. Part of this review involved verifying authority citations and calling the agency when a citation was in error or incomplete. By 1960, the volume of published rules had increased beyond the means of the small Federal Register staff. In addition to this, it was reasonable to assume that the issuing agency was now in a much better position to know what laws it was implementing and how to cite them. Consequently the Federal Register regulations were amended by adding the following section under the heading "Citations of Authority":

> § 17.46 *Agency responsibility; amendments.*
>
> The accuracy and integrity of citations of authority are the responsibility of the issuing agency. Such citations shall be formally amended by the issuing agency to reflect changes in authority.

Now without benefit of the close review of authorities by the Federal Register staff, the general counsel of every agency was expected to be extremely careful in providing the correct authority citations and keeping them current. The Federal Register Office continued to provide assistance to small agencies which have no general counsel and to others on request.

To prepare the Parallel Table, Federal Register editors search the agency rules and list all United States Code provisions appearing in the authority citations. Authorities consisting only of public law number on U.S. Statutes at Large citations are changed to the parallel United States Code reference when possible. The Table is published annually as Chapter I of Title 2 of the Code of Federal Regulations. Additions to the Table are printed monthly at the end of the "List of CFR Sections Affected," a supplementary guide to the daily *Federal Register.*

II. FINDINGS

The accuracy of a citation is the issuing agency's responsibility; thus the reliability of the Table depends primarily on the care the agency takes to present and keep current the proper citations of authority for every provision promulgated. The degree of care has varied beyond acceptable limits. A spot check of the Table revealed many questionable entries. One citation may be so general that it is of little help to the researcher (see 18 CFR Part 602 or 25 CFR Part 22). Another may be so long and complicated that it tends to create confusion (see 46 CFR Part 163). One U.S.C. citation in Title 46 leads the researcher to more than 70 CFR parts. Further examination indicated little concern by the agency as to whether its citations of authority are really accurate or pertinent. Some rules have no citation to the United States Code (see 25 CFR Part 47); others cite material in the text of the rule which is not picked up for the Table (see 42 CFR 77.1). And there are instances of total misunderstanding of what authority to use (see 32 CFR Part 257).

There is also a lack of concern about keeping citations current. Some rules in Title 7 CFR cite many authorities which have been obsolete for years. A review of 7 CFR Part 1871—a brief regulation—revealed that twenty-three of its twenty-seven citations were wrong, or unnecessary: Three of the provisions cited had been renumbered, fourteen had been repealed, three had related to bankruptcy actions, two applied only to Territories, and one was an authorization for appropriations rather than a rule-making provision.

III. CONCLUSIONS

To improve the table, at least two steps should be taken:

First, the agencies must be urged to review their statutory citation practices with the Parallel Table in mind. This review should include references appearing in the authority citations themselves, in the text of the rules, or in the preamble. All changes should then be included in formal documents prepared for publication in the *Federal Register* as CFR amendments.

Second, when the revised Parallel Table is prepared, its coverage should be expanded to include citations in preambles and substantive text, as well as those in the formal authority statements. At present, the Table lists only United States Code provisions cited as authority for issuance. Well-drafted rules normally contain a section called "Scope and purpose." This section cites statutory provisions being implemented by the rule. Often this valuable citation is not repeated in the authority citation, hence is not picked up for the Parallel Table.

Sometimes an agency will cite useful authorities in the preamble or discussion paragraphs of a document. Since only the substantive text of the rule is published in the Code of Federal Regulations, these citations also are lost.

Finally, there are many instances where a pertinent citation is missing, either because the statutory provision is not citable to the United States Code, or because the rules were issued before the United States Code supplement was published. A supplementary table listing these provisions by law number and U.S. Statute page should be created.

RECOMMENDATION NO. 4

CONSUMER BULLETIN

Most Americans are probably unaware of the multitude of day-to-day Federal activities reflected in proposed, revised, and recently promulgated rules, regulations, or determinations which substantially affect the price, quantity, quality, labeling, safety, and other aspects of products and services available to the public. A bulletin of general distribution containing an easily understood summary of current information about administrative activities in areas of consumer interest could serve a widespread public need which is not now met by the "Federal Register" or by agency and private publications of a more specialized nature.

RECOMMENDATION

1. A consumer bulletin should be established on an experimental basis. It should extract and paraphrase in popular terms the substance of Federal agency actions of significant interest to consumers. Initially, the bulletin should concentrate on items published in the "Federal Register," but as it gains public acceptance, it should be broadened to include materials secured from other sources. It should indicate expressly that the bulletin does not constitute official notice of government action.

2. The Office of the Consumer Counsel in the Department of Justice appears at this time to be the agency best prepared to publish such a bulletin. If the bulletin were undertaken by that office it could not only disseminate information, but also stimulate public response, thus aiding the effective discharge of the duties of the Consumer Counsel.

3. Initial circulation should include the press, consumer organizations, public and scholastic libraries, and individuals who request to be put on the mailing list. Format, subscription costs, frequency of publication, and related matters should be the subject of study during the experiment.

4. After a reasonable period of time, the effectiveness of and interest in the bulletin should be evaluated to determine whether it should be continued and, if so, in what form.

REPORT OF THE OFFICE OF THE CHAIRMAN IN SUPPORT OF RECOMMENDATION NO. 4

The only federal publication of general national circulation which contains announcements and information of proposed or new government rules and regulations of interest to consumers is the Federal Register. As Miss Betty Furness, Special Assistant to the President for Consumer Affairs, stated in a letter to the Chairman of the Administrative Conference suggesting the development of a Consumer Bulletin:

> "I have become concerned about the lack of consumer involvement in government rule making affecting consumers. Day by day, agencies of our government fill the Federal Register with proposed and final rules, orders, and policies which directly and importantly affect consumers. Yet these publications go virtually unnoticed by consumers. More importantly, consumers are not participating in the establishment of the rules which are supposed to reflect the interest of the consumer.
>
> "When the laws prescribing the method of publication and issuance of regulations were designed, they were aimed largely at providing a fair notification procedure for the industry regulated under the rules. No doubt this system has afforded 'due process' to the regulated industry. Yet the system apparently does not perform the function of providing the consumer with notice sufficient to stimulate him to participate in the making of rules which directly and significantly affect him. Stated in another way, it may be that the legal requirements of fairness also necessitate additional assistance to the consumer.
>
> "Obviously, the consumer is in a poor position to attempt to comprehend the legal and technical language comprising the typical Federal Register notice—if, indeed, he knows of the existence of the Federal Register. The consumer does not have the benefit of the professional advice available to industry through house counsel, trade associations, trade papers, "Washington counsel, etc. In most cases he has neither the time nor the collateral library materials to allow him to keep track of developments.
>
> "With the above in mind, I am submitting for the consideration of the Administrative Conference a file containing a few suggestions developed in my office for involving consumers in governmental rule making.
>
> "Essentially, what I am proposing is that there be established a regular publication serving the needs of consumers in the same way that the Federal Register serves the needs of the regulated industry—a 'Consumer's Federal Register' if you will. I think it would serve consumers' needs if the major issues, culled from each proposed and final rule directly and importantly affecting consumers, were summarized in such a publication with brief explanation of how the consumer could register his

> views or obtain more information from the agency issuing the rule. The publication could be made available to consumers for a nominal sum.
>
> "Our proposal does not explore the questions of whether fairness or the elements of due process for consumers also might require preliminary public hearings prior to the adoption of such a rule, and of whether the validity of such a rule might be made dependent upon proper translation and publication for consumers. These and other questions pertaining to the proposal are deferred to you and the Conference."

Upon receipt of the letter from Miss Furness, the Council members were contacted and it was agreed that a Consumer Bulletin should be the subject of a study by the Conference. Mr. Leonard Niederlehner, Acting General Counsel of the Department of Defense, and Chairman of the Committee on Information, Education and Reports was advised of this determination. The Consultant to that Committee, Professor Jerome Shuman of Howard University, immediately undertook a study of the legal and other problems. At the same time, the professional staff of the Conference surveyed the kinds of information currently available in the Federal Register which might appropriately be included in such a Bulletin. Appendix A describes items found in the Federal Register during a two-week period chosen at random.

Professor Shuman interviewed a number of individuals within and without government; and in an informal memorandum recommending the establishment of a Consumer Bulletin, he said:

> "Federal agencies generally publish in a wide variety of formats the decisions, activities, findings and rulings which take place within the scope of their operations. Much of the information contained in these publications have consumer implications. However, the consumer remains unaware of many of the rules, orders and policies established by government even though he is directly affected by them. * * * What is needed is a regular publication that will serve the needs of the consumer in much the same way the Federal Register serves industry. The proposed bulletin would bring together in one place this consumer information. The information contained in the Bulletin would be drawn from existing government publications. No agency need be required to develop information especially for the Bulletin. In its initial stage the information in the Consumer Bulletin could and should parallel that included in the Federal Register except it would be brief and would be written in language readily understandable by all."

Professor Shuman noted the existence of several excellent private publications, as well as those of some agencies, none of which, however, has the scope of the proposed Bulletin.

After considering several alternatives, he concluded:

> "The newly created Office of Consumer Counsel should be the office responsible for the development, publication and dissemination of the Consumer Bulletin."

The subject was considered by the Council at its meeting on November 11, 1968. The recommendation to establish a Consumer Bulletin in the Office of Consumer Counsel, Department of Justice on an experimental basis was approved. Subsequently, the Administrative Conference has been advised that the Attorney General, and the Consumer Counsel, Mr. Paul Bower, support the establishment of a Consumer Bulletin and its publication by the Office of Consumer Counsel.

ATTACHMENT

ILLUSTRATIVE MATERIAL SELECTED FROM THE FEDERAL REGISTER

(COVERING THE TWO WEEK PERIOD BEGINNING APRIL 23, 1968)

Headlight Concealment Devices—Referring to "reports of several accidents and incidents caused by . . . inadvertent blacking out of headlamps," the Federal Highway Administration announced that it has adopted a Motor Vehicle Safety Standard for headlight concealment devices. Among other provisions in the new Standard is a requirement designed to insure fail-safe operation of such a device in the event of a malfunction affecting its power supply. If provided on an automobile built on or after January 1, 1969, the device must remain open if it is open when the malfunction occurs; and if it is not open at the time, it must be capable of being opened without using tools.

More Automobile Safety Standards—Other new Safety Standards of Federal Highway Administration provide for:

—*A second hood latch or latching system*, if a sudden hood opening would partially or completely obstruct the driver's forward view (effective 1–1–69).

—*Three anti-theft features:*

1. *More key and lock variations* (no less than 1000 for a major manufacturer).
2. *A wheel-locking or steering-locking system* triggered by removing the ignition key.
3. *A warning device* which is activated when the driver opens his door without removing the ignition key.

(All effective 1–1–69)

Pesticides—The Food and Drug Administration has issued a statement of policy setting forth guidelines which the agency will follow in fixing tolerances for pesticides that might find their way into milk, eggs, meat or poultry. These tolerances regulate the amounts of poisonous or possibly poisonous pesticides that may be used on raw agricultural commodities.

"Made in U.S.A."—In an advisory opinion issued on April 4, 1968, the Federal Trade Commission ruled that this label cannot be placed on garments manufactured in this country from imported cloth.

Instant Nonfat Dry Milk—The Department of Agriculture and the Department of Health, Education, and Welfare have reached a policy agreement which will serve as a basis for a coordinated instant nonfat dry milk program. The program will include minimum standards and inspection provisions for manufacturing grade milk, the farms which produce it, and the plants and equipment which process it. The two Departments also agreed that these standards should be made progressively more stringent.

In-Flight Entertainment and Service of Alcoholic Beverages—In light of a number of objections, the Civil Aeronautics Board has decided to reconsider its recent policy statement concerning passenger charges for visual in-flight entertainment and in-flight service of alcoholic beverages. Under this policy statement the airlines were advised to make separate charges for these services. The rule did not apply, however, to beer and wine served with meals.

Cottage Cheese Ingredient—A petition has been filed with the Food and Drug Administration which requests the FDA to amend its rules so as to permit the addition of lactose to the creaming mixture used in the preparation of cottage cheese. According to the petition, lactose would improve the flavor, body, sensation of richness, shelf life and eye appeal of the product. The FDA invites all interested persons to submit their views in writing (preferably with four extra copies) on or before June 1, 1968. Comments should be addressed to: Hearing Clerk, Department of Health, Education, and Welfare, Room 5440, 330 Independence Avenue, S.W., Washington, D. C. 20201.

Catsup—The FDA has been requested in another petition to amend its identity standard for tomato catsup insofar as sweetening agents are concerned. Catsup may now be sweetened with dextrose only if it is used in combination with sugar, and with corn or glucose syrup only if the corn or glucose syrup solids do not exceed one-third of the solid weight of all sweetening mixture. The proposed amendment would permit dextrose to be used as the sole sweetener and increase the allowable proportion of corn and glucose syrups. The FDA has invited comments, and except for the deadline, the procedure is the same as that for the proposal affecting cottage cheese which is described above; in this case comments must be filed on or before June 29, 1968.

RECOMMENDATION NO. 5

REPRESENTATION OF THE POOR IN AGENCY RULEMAKING OF DIRECT CONSEQUENCE TO THEM

RECOMMENDATION

A. AGENCY EFFORTS

1. Federal agencies should engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. For this purpose, agencies should make strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings. The "rulemaking" referred to is that defined by the Administrative Procedure Act, § 2(c), 5 U.S.C. 551 (4) and (5).

2. Agencies should employ as many of the following procedures as are feasible, practicable, and necessary to assure their being fully informed concerning the relevant interests of the poor:

(a) Agencies should seek to inform the poor of all rulemaking proposals that may affect them substantially and should provide opportunities for the poor to submit their views concerning these and related proposals.

(b) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor substantially affected by contemplated rulemaking.

(c) Agencies should take care to invite individuals constituting a representative cross-section of the poor to submit their views orally or in writing as to proposed rules substantially affecting the poor.

(d) Agencies should conduct field surveys among the poor to discover their attitudes concerning particular government policymaking substantially affecting them.

(e) Agencies should use advisory committees made of representatives of the poor as continuing consultants for all programs having a substantial effect on such persons.

(f) When necessary to assure adequate representation for the poor, agencies should pay the personal expenses and wage losses incurred by individuals incident to their participation in rulemaking hearings. Congress should support agency requests for funds and for authority, where none exists, to make discretionary payments for this purpose. Agencies already authorized to make such payments in whole or in part should use their existing authority and should allocate funds accordingly.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve doubts in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

In carrying out paragraphs 1 and 2 of this recommendation, agencies should consult with and coordinate their efforts with other Federal agencies having responsibilities in this area and should make maximum feasible use of the facilities of such other agencies for communicating with and obtaining expressions of the views of the poor.

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C 553(a)(2) should not be applied with respect to rulemaking which may have a substantial impact on the poor.

B. PEOPLE'S COUNCIL

4. (a) An organization should be authorized by statute to employ a staff to act as "People's Counsel." The People's Counsel should represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor.

(b) The People's Counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in such Federal administrative rulemaking.

(c) The People's Counsel should be required to disseminate to all interested poor people's organizations pertinent information concerning rulemaking substantially affecting the poor.

(d) The People's Counsel should be authorized to participate suitably in its own name to represent the interests of the poor in any Federal agency proceedings in which the poor have a substantial interest.

(e) The People's Counsel should be authorized to provide representation for organizations and groups of the poor who seek judicial review of administrative action substantially affecting their interests. This recommendation is not to alter the kinds of agency action amenable to judicial review, the requirements of standing to seek review, or the scope of that review.

(f) As an incident to its main responsibilities the People's Counsel should be empowered to recommend to Congress or the

President or to both such legislation or other action as it deems appropriate to correct deficiencies in or otherwise improve Federal programs having a substantial impact on the poor.

5. (a) Congress should provide for an appropriate body to perform the functions outlined in section 4. Deserving of consideration as such body would be a new single-purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Public Law 90–129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as the People's Counsel Corporation. In the event this form of organization is adopted, the following considerations should apply:

> (1) The People's Counsel Corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the Corporation should be made deductible as charitable contributions for Federal income tax purposes.
>
> (2) Federal financing of the Corporation should be made available to the extent necessary to assure its effective operation.
>
> (3) The governing board of the People's Counsel Corporation should be constituted to give the poor meaningful representation thereon. Such body should be constituted to ensure close communication with the poor and effective representation of the viewpoints of the poor.

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that [such] notice and * * * [an opportunity for the People's Counsel to present its views] are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

Without prejudice to creating or empowering any other appropriate body to perform the general functions outlined in paragraphs 4, 5, and 6, any special provision therefor should be so structured as to take maximum advantage of the capabilities in this field of nongovernment organizations, and of other public bodies, including notably the Office of Economic Opportunity.

SEPARATE STATEMENTS[1] CONCERNING RECOMMENDATION NO. 5

Statement of John H. Crooker, Jr.

The majority position with respect to recommendation No. 5 is that "Federal agencies" should make strong efforts to ascertain from the poor their views regarding rulemaking "that may affect them substantially." I believe that (*a*) the major independent agencies are seldom involved in rulemaking affecting the poor except insofar as the poor are members of the public generally; and (*b*) it was the intent of the Congress, in establishing the Administrative Conference, to have studies conducted and information collected and interchanged, so that administrative agencies might improve and expedite their general procedures.

Therefore, I doubt that the Congress, in enacting section 5 of the Administrative Conference Act, 5 U.S.C. 574, intended that the Conference should address itself to the matters treated in recommendation No. 5. My dissent is not, in any way, directed to the wording of the recommendation.

Statement of Paul Rand Dixon

I disagree with the adoption of paragraphs 4, 5, and 6 of recommendation No. 5 developed by the Committee on Rulemaking respecting the creation of a People's Counsel to represent the poor generally before Federal administrative bodies. I am fully aware of and sympathetic with the plight of the poor in our society. I recognize it as one of the primary problems that must be solved if our democratic way is to survive. However, I am fully of the opinion that this is a problem that should be debated and resolved by Congress. I find nowhere in the legislative history leading to the creation of the Administrative Conference of the United States any thought that the Administrative Conference would delve into this social problem. Even if I could bring myself to the thought that it was rightfully within the purview of the duties of the Administrative Conference to deal with the plight of the poor, I still would question the wisdom of creating a Poor

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[1] Title 5, U.S.C., sec. 575(a)(1) provides, in part, as follows: "A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof."

People's Counsel as the sole, if not principal, protector of the rights of the poor. The plight of the poor needs everyone's protection, not just the protection of a People's Counsel.

So that my position will not be misunderstood, I want it clearly known that I stand in the forefront of those who deem it necessary to do more to protect those low-income people in our society who are generally classified as poor.

Statement of Joe M. Kilgore, joined by Richard H. Keatinge; Jim C. Langdon; Norman A. Flaningam;[2] *Ross L. Malone; Starr Thomas; Harold L. Russell*

We did not support paragraphs 4, 5, and 6 of the recommendation No. 5. We do support encouraging the formation of and recognition of a People's Counsel, as a private entity, to represent the public interest in the area of rulemaking in Federal agencies; with such Counsel being oriented to represent most fully those of the public whose interests would otherwise be unrepresented or underrepresented; and with such People's Counsel being eligible to receive Federal grants as required to permit its function.

This dissent from the majority view is dictated by:

1. The concern that this proposed function should be restricted, at least until experience might dictate otherwise, to the rulemaking function.
2. The belief that the proposed representation should not be limited to any segment of the public, even though its principal thrust would be so directed.

Statement of Malcolm S. Mason

I support the purposes of this recommendation. When a People's Counsel is constituted, however, it is important to make a distinction between two kinds of advocacy, so different that they cannot be directly conducted by the same organization. There is first of all adversary advocacy, owing an attorney's complete loyalty to a specific client. In this sense, there cannot be a People's Counsel for the poor, because the poor are many and different and must be able to speak with many voices. This kind of advocacy is needed. It must be aggressive and hardhitting. If it is conducted directly by a Government or Government-controlled agency, its independence may be impaired. For this kind of advocacy an appropriate model is suggested by the Legal Services program conducted by many separate private local organizations:

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[2] Mr. Flaningam joins in this statement noting that the term "rulemaking" as used herein refers to Federal agency processes for formulation, amendment, or repeal of rules of general applicability.

Funded by OEO, but free, and indeed encouraged, to act fully on behalf of an actual client without limiting its vigor by reason of relationship to OEO. This I believe, will also be the pattern of the new HEW Legal Services program.

There is also cooperative advocacy: Unaggressive, quiet, nonadversary, seeking to foster an awareness, a concern and a more lively recognition that poor people are affected by proposed administrative action. This kind of advocacy can be conducted by a Government or quasi-Government organization without inconsistency and with benefit to the effectiveness of its work. An appropriate model is suggested by such accomplishments as new rules on loans to demonstration cooperatives of poor farmers (achieved by mutual agreement of the Department of Agriculture and OEO) ; new clarification of Government security regulations, removing barriers to the employment of hard-core unemployed with a criminal record (achieved by joint action of the Department of Defense, Department of Labor, and OEO) ; a new consensus on the wider use of policy advisory boards in programs affecting the poor (resulting in part from encouragement of this kind of action by OEO).

I urge that the Conference recommendation be implemented. In its implementation, contributions already made in this field should be recognized and used as a basis for expanded activity. The distinction between the two different types of advocacy should also be reflected in the choice of appropriate structure. Both are needed.

Statement of Nathaniel L. Nathanson

I would like to explain why I voted in favor of the recommendation for a People's Counsel, as amended during the debate, because I believe that my interpretation of the final action taken may have been shared by others who also voted in favor of the proposal and is therefore entitled to some consideration in efforts to secure its implementation.

While I was deeply troubled by some of the arguments advanced against the proposal, particularly by the misgivings expressed concerning the arrogance of a government agency or public corporation undertaking to determine the interests of the poor in particular agency action, I felt that this concern could be met by emphasis upon the representative character of the People's Counsel and a requirement that specific, identifiable interests be represented, rather than hypothetical interests which might be imagined by the People's Counsel. This requirement could appropriately be implemented by the further requirement that those interests be identified in the form of particular groups or associations who could determine their own interests and make their own wishes or basic positions known to the People's Counsel. This view was certainly made explicit in the amendment, proposed by the Judicial Review Committee and accepted by the Rulemaking Committee, to paragraph 4(e) and it is also consistent with the final language of paragraph 4(d) as amended in the course of the debate so as to substitute "participate suitably" for the original word "intervene." This left a large measure of discretion to each agency in allowing participation by the People's Counsel in a particular proceeding, including the requirement of a showing that the concern or position which the People's Counsel undertook to present was in fact shared by an identifiable group of people who were at least informed of the position which the People's Counsel was taking. I also doubt that the leaders of the poor people's movement who were quoted by Professor Bonfield as favorable to the proposal envisaged a People's Counsel who would not be in any way answerable to the people he undertook to represent.

I appreciate that this interpretation, emphasizing as it does the representation of identifiable groups who may exercise some control over the People's Counsel, may not be entirely acceptable to the original proponents of the proposal, particularly those who accepted the amendments with some reluctance. Nevertheless, they did accept the amendments, presumably for the purposes of mollifying the opposition and with some appreciation of the fact that the reasons for the amendments were more than technical. Particularly in view of the closeness of the vote on the final approval of paragraphs 4, 5, and 6, the original proponents are hardly now in a position to insist upon the rejection of a reasonable interpretation which may have been decisive in the approval of the recommendation. They may also take comfort in the fact that the current requirements for standing to participate in both administrative and judicial proceedings by groups indirectly affected by governmental action will scarcely inhibit the activities of a People's Counsel anxious and resourceful enough to find out what the people he purports to represent really want.

Statement of Robert W. Graham

May I respectfully record my dissent from the recommendations of the Conference embodied in paragraphs 4, 5, and 6 of recommendation No. 5. No one can disagree with the stated objectives of these recommendations, and I do not. However, I do not conceive that these recommendations are appropriate within the mission of the Administrative Conference in its efforts to seek improvement of administrative procedures. Furthermore, I consider unsound attempts to fractionate the public interest which is properly the concern of our Federal administrative agencies.

REPORT OF THE COMMITTEE ON RULEMAKING IN SUPPORT OF RECOMMENDATION NO. 5

Prepared by
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I. THE PROBLEM

A. *Generally*

The sound operation of the federal administrative rulemaking system demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of its product. Only after such an examination can the responsible officials have any confidence in the soundness of the rules they create. Officials engaged in rulemaking for the federal government are usually apprised of the various interests and viewpoints deserving consideration in that process by representatives of individuals affected by their actions.

The ample personal economic resources and relatively well-financed organizations of middle and upper income Americans usually assure their particular interests adequate representation in federal administrative rulemaking. The norm is that middle and upper income individuals, or their personal or organizational representatives, directly or indirectly monitor all agency activities. These persons attempt to protect their interests through formal or informal participation in rulemaking affecting them. But federal rulemaking very frequently affects large numbers of individuals who lack the personal economic resources and organized associations of middle and upper income Americans. These economically underprivileged persons are usually unable to keep themselves adequately informed of the numerous actual or proposed exercises of rulemaking authority affecting their interests. Normally the poor are also unable to communicate effectively to the appropriate authority their views about proposed rules, or to petition in their own interest for new rules or for the amendment or repeal of old rules.

An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process.

The administration of government undoubtedly suffers as a whole from the inability of the economically underprivileged segment of our society to represent adequately its group interests in the rulemaking process. The inability of the poor in this respect is injurious to the government's sound administration because it sometimes results in the formulation and promulgation of policy without consideration of all the relevant viewpoints. Recent responses of the poor to the product of such an improperly functioning process have been expensive, time-consuming, and unfortunately, too often destructive. Ill-considered rules have frequently caused litigation, civil disobedience, and on occasion, riot. Some of this might have been avoided if the views of the poor were considered in the initial formulation of agency policies affecting them.

This conclusion does not ignore the many well-intentioned and often considerable efforts of the appropriate officials to ascertain, by their own investigations, the views of the economically underprivileged concerning administrative rulemaking that affects them. But available evidence establishes that these official efforts have been insufficient to compensate for the inability of the poor affirmatively to represent their own interests in rulemaking. The fact is that government administrators are too often inadequately apprised of the poor's views respecting the desirability of existing or proposed rules.

B. *General Summary of the Evidence*

Substantial evidence supports the conclusion that the poor of our society have been inadequately represented in federal rulemaking. Some original data on this subject was obtained from a questionnaire entitled "Survey of Participation of the Poor in

Agency Rulemaking of Particular Interest to the Poor" distributed to some forty federal agencies during the summer of 1968.[1]

Each federal agency surveyed was asked the following initial question:

1. What programs does your department or agency administer
    a. that are directed primarily at the economically underprivileged segments of our society, or,
    b. although not directed primarily at such segments, may have a very substantial impact on them?

Most agencies listed those programs under their respective jurisdictions reasonably falling within the above categories. However, the questionnaire responses indicated that a few agencies administering programs in class (1)(b) above do not recognize that they are in fact doing so. This is, even though they are administering some programs having a very substantial impact on the poor, a significant number of agencies replied to question (1)(b) by stating that they administered no programs of that type.[2] In addition, a few agencies that did list some programs

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[1] The following agencies responded to the questionnaire which was distributed as a survey of the Rulemaking Committee of the Administrative Conference of the United States: Department of Justice; Civil Service Commission; Post Office Department; Department of Agriculture; Department of the Interior; Department of Health, Education, and Welfare; Tennessee Valley Authority; Department of Labor; Office of Economic Opportunity; Equal Employment Opportunity Commission; Federal Power Commission; United States Commission on Civil Rights; Small Business Administration; National Capital Planning Commission; Federal Communications Commission; Securities and Exchange Commission; Foreign Claims Settlement Commission of the United States; National Science Foundation; National Advisory Council on the Education of Disadvantaged Children; Smithsonian Institution; President's Council on Youth Opportunity; Department of State; Washington Metropolitan Area Transit Authority; Department of the Treasury; General Services Administration; Appalachian Regional Commission; Interstate Commerce Commission; Farm Credit Administration; Federal Reserve System; Veterans Administration; Federal Home Loan Bank Board; Department of Commerce; Department of Housing and Urban Development.

[2] The following examples are illustrative:

"Concerning the study that your Committee on Rulemaking is making of participation of the poor in agency rulemaking . . . [the U.S. Civil Service Commission is] declining to attempt to fill out the questionnaire because we do not believe it is applicable to us." Yet that body makes the general rules for government hiring and classification of employees, and it administers nondiscrimination in government employment [under Exec. Order No. 11,246, 30 Fed. Reg. 12319 §§ 103, 104 (1965)].

"Please be advised that the General Services Administration does not appear to have programs of the nature contemplated by the Survey of Participation of the Poor in Agency Rulemaking." Yet many of the programs administered by this agency undoubtedly fit within class (1)(b) of the question in the text since the manner and conditions under which the national government purchases and sells supplies and property and cares for and constructs federal buildings undoubtedly has a substantial impact on the poor.

"This is in reply to your letter of July 18 which requested responses to a survey questionnaire dealing with programs administered by [the Post Office] Department which are directed at or have a very substantial impact on the poor. The Department does not administer any such programs. Our primary activity, moving the mail, and our programs to effect that end, are not directed at any economic group and do not have the impact on the poor contemplated by your questionnaire." Yet the Post Office is one of the largest actual or potential government employers of "poor" people. Its part-time hiring during Christmas, for example, has a substantial impact on the poor. In addition, whether it delivers mail on five or six days a week may have a qualitatively greater impact on the poor than on others. If the poor cannot get having a substantial impact on the poor neglected to list all of their programs fitting into that category.[3] If the agencies involved do not understand that some of their programs have a substantial impact on the poor, or cannot determine which of their programs have that effect and which do not, the interests of such persons are inadequately represented in rulemaking for those programs.

The questionnaire also asked the agencies surveyed:

> 5. Does your agency now attempt to ascertain the views of poor and economically underprivilegd persons in respect to rules and policies proposed to be issued to implement the programs listed in response to question 1 above? If so, please describe in detail the procedures you use in each program to ascertain these views.

About one third of the agencies claiming to administer programs substantially affecting the poor indicated that they had not previously attempted to ascertain the views of economically underprivileged persons with respect to rules and policies proposed by the agencies to implement those programs. A typical response of this kind stated that "We do not now attempt to ascertain the views of the poor and economically underprivileged, as such." [4]

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their welfare or social security checks on time because mail is delivered only five days a week, they have no other resources to fall back on.

[3] The following examples are illustrative.

While the Department of Labor lists enforcement of Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000 (1964)] implemented by regulations found in 29 C.F.R. pt. 31 (1968), it does not list its role as implementor of Executive Order No. 11,246, 30 Fed. Reg. 12319 (1965). The former program is to effectuate the policy of the Civil Rights Act of 1964 that no person shall, on the ground of race, color, etc. be excluded from participation in or discriminated against in any program receiving federal financial assistance from the Department of Labor, while the latter is a program administered by that Department to assure nondiscrimination in employment by government contractors and subcontractors. In addition, while the Department of Labor does list the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2041 (1964), implemented by regulations found in 29 C.F.R. pt. 40 (1968), it does not list as a program substantially affecting the poor the *bracero* program partially administered by that department under 20 C.F.R. § 602.10 (1968). The former program requires certain persons to obtain certificates of registration prior to performing any activities which constitute engagement in farm labor contracting, while the latter requires that the Secretary of Labor certify certain facts as a condition for the admission of aliens to perform certain temporary agricultural or logging industry services.

While the Department of Agriculture lists many programs it administers having a substantial impact on the poor it does not list the price support and production stabilization programs administered by the Commodity Credit Corporation and the Agricultural Stabilization and Conservation Service. Also omitted from the Department's enumeration of its programs having a substantial impact on the poor are the Rural Electrification Administration programs and Federal Extension Service programs. *See* 1968-69 UNITED STATES GOVERNMENT ORGANIZATION MANUAL 273-77, 283, 294.

[4] Veterans Administration. Responses of a significant number of other agencies were similar. The following examples are illustrative:

The Federal Home Loan Bank Board reported that it "makes no special provision to secure the views of poor persons." The Tennessee Valley Authority simply answered question 5 "No." "The [Federal Power] Commission does not make an overt effort to solicit the advice of the poor as such . . . ." "The Department [of Transportation] does not, by regulation, specifically, attempt to ascertain the views of the poor in regulatory activities listed in paragraph 1." "The views of poor and economically underprivileged persons have not been actively solicited [by the

About two thirds of the agencies reporting that they administered programs substantially affecting the poor stated that they had made some efforts to ascertain the views of those people with respect to rulemaking for such programs. In most cases, however, the efforts described are totally inadequate for the purpose. They are frequently haphazard, unsystematic, and sporadic.[5] The means used have sometimes been so informal and unstructured as to achieve the result only incidentally and accidentally if at all.[6] Furthermore, agencies frequently seem to have sought information about the views of the poor from persons who are neither poor nor reliable spokesmen for the mass of the poor affected by those agencies' actions.[7] The answers to question 5 also indicate that very few of those agencies stating that they attempt to ascertain the views of the poor make any consistent

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Federal Reserve System] in respect to rules and policies regarding the program mentioned in 1b, above . . . ." "There is no regular procedures in effect whereby the views of the poor are obtained in connection with the issuance of policies and procedures" of the Department of Housing and Urban Development.

Many of the above responses do, however, go on and assert specifically that this does not mean that the interests and views of the poor are ignored with respect to that portion of the agency's policy-making which affects them.

[5] The following examples are illustrative:

For three out of the five programs reported by the Small Business Administration as having a substantial impact on the poor, it answered question 5 "No." While it claimed to make an effort to ascertain the views of the poor with respect to some programs, the Department of Health, Education and Welfare reported that it did not make a specific attempt to solicit regularly the views of the poor as such with respect to rulemaking for the Old Age Survivors and Disability Insurance Programs and the Social and Rehabilitation Services Programs. The Department of Agriculture reported that it "has not heretofore, on its own initiative attempted to ascertain the views of poor and economically underprivileged persons in respect to rules and policies proposed to be issued to implement the listed [food distribution] programs," but it has attempted to do so with respect to programs administered by the Farmers Home Administration.

[6] For example, the Equal Employment Opportunity Commission reported that "[o]ur agency ascertains the views of economically underprivileged persons in respect to rules and policies informally insofar as these views are elicited in the course of investigation of charges of unlawful practices."

[7] For example, the Department of Agriculture reported that it ascertains the views of the poor with respect to programs administered by the Farmers Home Administration (FHA) from its Technical Action Panels, County FHA Committees, and State FHA Advisory Committees. Yet these bodies rarely if ever have members who are poor persons themselves, that is, members "of the poor"; and these bodies rarely have adequate representatives of the poor's views as such among their membership. Some Technical Action Panels may have the Directors of local Community Action Program (CAP) organizations and welfare agencies among their number. But these officials do not necessarily represent the views of the mass of the poor since their CAP or welfare agency positions are controlled by the establishment, they are not themselves poor, and frequently their outlook may be middle-class- and establishment-oriented. This is especially true with respect to the Directors of CAP programs since the Green Amendment, 42 U.S.C. § 2790 (Supp. III, 1965-1967), *amending* 42 U.S.C. § 2790 (1964).

In addition, the Department of Health, Education, and Welfare reported that:

> The Social Security Administration [with respect to Medicare] consults with the Health Insurance Benefit Advisory Council, a panel of 19 persons outstanding in fields related to hospital, medical and health activities, on matters of general policy and in the formulation of regulations. The panel includes representatives of public and private medicine, hospitals, nursing homes, health insurance, labor, and the general public. The poor, as such, are not represented on the panel—the public, as such, is represented on the panel.

Obviously, attempts to ascertain accurately the views of the poor from these people are not likely to be very successful.

efforts to do so through means *specifically and specially* tailored to accomplish that result in a reliable way. For example, some agencies claimed that they attempted to ascertain the views of the poor by issuing general public invitations to all interested people, including the poor, to submit their views upon particular rules proposed by the agency.[8]

Responses to a further question are also instructive because they indicate that, in fact, the interests of the poor have rarely had any continuous and systematic affirmative representation in the federal rulemaking process. That question asked:

> 7. Have any particular groups or organizations intervened or otherwise participated for the purpose of representing the views of the poor in rule-making or in proposing rules in connection with any of these programs? If so, please identify the groups or organizations and indicate the frequency of such participation and the method by which each group or organization has participated.

About half of the responses from agencies acknowledging that they administered programs substantially affecting the poor indicated that no particular groups or organizations had intervened or otherwise participated in their rulemaking for this purpose.[9] An additional number of respondents indicated that outside organizations had participated, on behalf of the poor, in agency rulemaking for some programs substantially affecting such people, but not at all in the rulemaking for other such programs.[10]

According to the responses received to another interrogatory contained in the questionnaire, the present situation is not likely to change very much without external stimulation. The agencies were asked:

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[8] For example, the Department of Labor reported:

> When notice of proposed rulemaking is given, the Department of Labor invites every interested person to submit written data, views or argument, and, when an opportunity is provided for oral presentations, to participate orally. Special notice is customarily given labor unions where interest of their members is involved.

And the Federal Trade Commission reported that it attempts to ascertain the views of the poor "through building up of public records contributed by members and representatives of all sectors of the economy and through the holding of public hearings in some cases." According to the questionnaire responses, no special effort seems to be made by these two agencies to notify the poor or solicit their views as distinguished from the public generally. Certainly the unions are not adequate representatives of the poor's interests before the Department of Labor.

[9] For example, the Department of Transportation reported that: "No particular groups have intervened or otherwise participated for the purpose of representing the views of the poor in rulemaking in this Department"; the Equal Employment Opportunity Commission reported that "[n]o group or organization has formally intervened or participated for the specific purpose of representing the views of the poor in rulemaking"; and TVA simply answered question 7, "No."

[10] For example, the Small Business Administration reported that no groups participated to represent the poor in rulemaking for any of its programs except the Economic Opportunity Loan Program, where many groups have participated for this purpose. Similarly, the Department of Agriculture reported that for food distribution programs, some groups had participated, but for Farmers Home Administration programs, "[t]he answer to this question is in the negative."

> 6. Does your agency contemplate using any particular means not utilized at the present time by it to insure that the views of the poor are adequately ascertained prior to the promulgation of any rule intended to implement or affect these programs? If so, please explain in detail.

A number of very important agencies from the point of view of the poor indicated that they intended to institute new and more effective means by which to ascertain the views of the poor with respect to rulemaking substantially affecting those people.[11] However, most agency respondents indicated that they had no such plans, and that they were satisfied with their present efforts in this regard.[12]

In addition to the responses gleaned from the questionnaire distributed to the various federal government agencies, other evidence directly or indirectly supports the proposition that the interests of the poor have had inadequate representation in federal rulemaking important to them. Officials of a number of major organizations purporting to represent some segment of the poor were questioned.[13] They indicated that poor people's organizations had only rarely participated in federal administrative rulemaking, and then only very recently and on an ad hoc basis. The reasons most often cited for the failure of the poor to participate more extensively in that process were their lack of knowledge that rules of interest to them were being considered, their lack of money to finance such participation, their lack of knowledge of the means by which they could participate, and the relevant agencies' lack of interest in ascertaining their views.

The representatives of those poor people's organizations questioned during this study also made another significant point.

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[11] The Department of Health, Education, and Welfare, the Department of Agriculture (but only in regard to consumer food programs), and the Department of Labor reported such plans.

[12] For example, the Veterans' Administration stated that: "[w]e have no plan at present to use any particular means other than those explained above, to insure that the needs of the poor veterans, as such, are ascertained prior to the promulgation of rules." The Equal Employment Opportunity Commission reported that: "[o]ur agency does not at present contemplate utilization of other means to insure that the views of the poor are ascertained prior to promulgation of rules." And the Small Business Administration and Tennessee Valley Authority both simply replied "No" to question 6.

[13] Among the people questioned, either in person or over the telephone, were Clarence Mitchell, NAACP; Cenoria Johnson, Urban League; Tim Sampson, National Welfare Rights Organization; Philip Ryan, in the offices of Marian Wright, Counsel to the Poor People's Campaign; Steven Rosenfield, Citizens Advocate Center; Norman Kurland, Citizens Crusade Against Poverty; and Larry Silver, Neighborhood Legal Services Program. All of the above are located in Washington, D.C. Also questioned were Gary Bellow of the California Rural Legal Assistance Program, McFarland, California; Junius Allison of the National Legal Aid and Defender Association, Chicago; and Leroy Clark, formerly of the NAACP Legal and Educational Defense Fund of New York.

They insisted that one of the most important deficiencies of the federal administrative process is the inability of economically underpriviledged persons to have their views adequately represented in the formulation of policies affecting them. In this connection it should be noted that the Poor People's Campaign of 1968 specifically and repeatedly demanded that there should be greater consultation with the poor and greater consideration of their views in the formulation of administrative regulations affecting them.[14] In responding to thoese demands, some federal agencies tacitly admitted that the poor had been inadequately represented in the formulation of administrative policy. Those few agencies stated that they intended to adopt new means to enhance the poor's participation in that process.[15] This fact correlates with the previously reported responses to question 6 of the questionnaire.

The official agency responses to some of the specific substantive demands made by the Poor People's Campaign of 1968 may also constitute some evidence that the poor have been inadequately represented in the federal rulemaking process. After examining objections raised by the poor, a number of agencies admitted that several of their substantive policies questioned by that Campaign were inadequate and should be changed.[16] This indicates that these agencies may not have been properly apprised of the relevant interests of poor people when the administrative decision makers first formulated the policies involved. A few officials have privately admitted that this was the case in some of those situations. (Of course, in other of those situations the decision makers may have been adequately apprised of the relevant interests of the poor and simply made unwise policy decisions. High quality representation of the poor's interests in rulemaking cannot invariably assure that administrators will make wise decisions!)

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[14] For example, the Poor People's Campaign demanded of the Department of Labor "[i]nvolvement of the poor in decision making about manpower training and other employment programs"; of the Office of Economic Opportunity "that the O.E.O. reorder its priorities so that the consumers of services be involved in the policy making . . . of those programs which continue to be administered by the agency"; of the Department of Health, Education, and Welfare (1) "that the Department of Health, Education and Welfare require of grantees that poor people be included in planning bodies under the comprehensive health planning and Medicare programs which have provisions for citizen membership on their planning boards" (2) that HEW "[e]stablish a national structure and mechanism which provides for continuous input by poor black, brown, and white people in the design, development, operation and evaluation of all federally funded education programs" and (3) that HEW "requir[e] that [welfare] recipients be involved in making policy and program decisions about how the program will be carried out by the states and localities."

The quoted demands may be found in the mimeo sheets entitled "Statement of Demands for Rights of the Poor Presented to Agencies of the U.S. Government by the Southern Christian Leadership Conference and Its Committee of 100, April 29-30, May 1, 1968" presented by the Poor People's Campaign to each of the above agencies.

[15] For example, note that the Department of Health, Education and Welfare replied to the Poor People's Campaign by stating that (1) "We will increase our efforts to involve persons representative of the poor in our activities and on Advisory Committees," (2) "we will establish, and require each state to establish, some vehicle for obtaining the advice of the poor, especially recipients in program and policy development," and (3) "the Commissioner [of Education] and members of his staff will meet with a group of persons broadly representative of the poor and arrange for continued participation of such a group with respect to all federally funded education programs in the Office of Education"; the Department of Labor responded by stating that "[a]dditional efforts to reach and to communicate with the poor must be made so that their needs are understood"; and the Office of Economic Opportunity responded to the Poor People's Campaign by stating that "[t]he Community Action Program is instituting a system by which drafts of major policy instructions will be circulated for comment to all grantees and national organizations interested in community action before becoming official. Representatives of the poor on C.A.A. boards and advisory counsels shall thus have a chance to discuss policy and make their views known to O.E.O before the policy is formally adopted. . . . The O.E.O. will involve the poor as consultants in O.E.O program development."

The above quotations may be found in the official responses from each of the above agencies to the demands of the Poor People's Campaign. Letters to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968, and June 18, 1968; from Willard Wirtz, Secretary of Labor, dated May 27, 1968; from Bertram Harding, Acting Director of OEO, undated and titled "Office of Economic Opportunity Response to Poor People's Campaign."

Similarly, a number of recent lawsuits may also attest to the inadequate representation accorded the poor in the federal rulemaking process. These suits indicate, in one way or another, that certain federal administrative action or inaction did not properly protect the interests of poor people.[17] A possible implication may be that the interests of the poor were so inadequately represented in those agencies' policymaking processes that a lawsuit was required to induce proper protection for the economically underprivileged.

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[16] For example, in response to a request for more stringent enforcement of fair employment by federal government contractors, the Department of Labor stated that it "will issue new guidelines requiring firms holding government contracts to use hiring and promotion tests that are racially culturally fair." It also stated that it "will issue new regulations to tighten the Labor Department equal opportunity programs," expanding coverage from first level to all levels of subcontractors and requiring positive action programs from contractors. Letter from Willard Wirtz, Secretary of Labor, to the Reverend Ralph Abernathy May 27, 1968. Similarly, in response to a demand that health services be made available to poor through comprehensive neighborhood health centers, the Department of Health, Education, and Welfare responded that it will pool funds from different sections of HEW and other agencies to support comprehensive health services in poor urban and rural areas. And in response to a demand that only declarations of facts be required of recipients under federally financed state welfare programs the Department promised to institute such a system. For both of the above HEW replies, *see* letter to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968. Note also that of the five high-priority changes in the size, shape, and location of food distribution programs demanded by the Poor People's Campaign of the Department of Agriculture, four were at least partially met. Des Moines Register, Nov. 16, 1968, at 8, col. 4, 5; Wall St. J., Dec. 12, 1968, at 2, col. 3.

[17] *See, e.g.*, King v. Smith, 392, U.S. 309 (1968), holding that the Alabama substitute-father regulation (which requires disqualification of otherwise eligible children from federally supported aid to dependent children if their mother cohabits with a man not obligated by Alabama law to provide support) defines "parent" in a manner inconsistent with the national Social Security Act and is therefore invalid with respect to the program. 392 U.S. at 333 n.4. To the extent HEW approved any man-in-the-house provision in state plans that conflicted with the Social Security Act that approval was improper because it was inconsistent with the controlling federal act. After *King v. Smith*, HEW issued new regulations outlawing such substitute-father rules. 33 Fed. Reg. 11290. In Thorpe v. Housing Authority, 386 U.S. 670 (1967), a tenant in federally assisted low rent public housing was given notice of eviction without explanation after being elected president of a tenant's organization. The Supreme Court vacated the judgment below affirming eviction and remanded for a reassessment of that judgment in light of directive issued by the Department of Housing and Urban Development after grant of certiorari requiring that no tenant be given notice to vacate without reasons for eviction and a chance to explain.

To all the above evidence may be added the fact that many scholars studying the poverty problem agree that the interests of the poor are inadequately represented in the rulemaking process. Moreover, in some situations the administrative rules or lack of administrative rules implementing a particular program affecting the poor treat the interests of those people in such a way that the poor were not likely to have been properly represented in their formulation.[18] It should also be recalled, as noted previously, that administrative policy makers almost always have middle-class backgrounds and therefore are not usually personally familiar with, or natural advocates for, the interests of the poor.

C. *Some Definitions*

In light of the above evidence, a number of specific recommendations with respect to representation for the poor in federal rulemaking seem appropriate. To assure precision, several terms utilized in the recommendation and in the remainder of this Article deserve definition. The words "poor" and "economically underprivileged" are used as synonyms. They refer to that group in our society unable to represent adequately its collective interests in federal rulemaking because its members lack the individual or organizational financial resources to do so. Consistent with this definition some groups of individuals may be poor or economically underprivileged in relation to certain rulemaking and not in relation to other rulemaking. This Article and the accompanying recommendations assume that people will be treated as poor only in the rulemaking situations where they are unable to represent themselves adequately because of their financial incapacity. Depending on the circumstances it is possible, therefore, that those who are deemed poor for present purposes may vary to some extent with the particular rulemaking involved.

The "rulemaking" referred to is that defined by section 2(c) of the Federal Administrative Procedure Act (APA).[19] "Rulemaking" therefore means "agency process for the formulation, amendment or repeal of a rule." The word "rule" refers to "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. . . ."[20]

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[18] *See, e.g.*, Note, *Welfare's "Condition X"*, 76 YALE L.J. 1222 (1967).

[19] 5 U.S.C. § 1001(c) (1964), *as amended*, 5 U.S.C. § 551(5) (Supp. III, 1965–1967).

D. *The Precise Scope of the Task*

The purpose of the recommendations is to assure that the interests of the poor in our society are adequately represented in all federal rulemaking having a substantial impact on them. In doing so, the primary concern is the ability of the economically underprivileged to participate in rulemaking both for those programs directly aimed at them and for those which, although not directed at the poor, substantially affect them as a separate group. However, the need for adequate poor people's representation in rulemaking extends beyond this. Rulemaking for some programs thought not to concern the poor and usually not affecting the poor may, on occasion, have a large impact on them. Consequently, an adequate remedy must include a mechanism for monitoring, on behalf of the poor, *all* federal rulemaking; and it must assure, insofar as practicable, representation for the poor in *all* rulemaking having a substantial impact on them, even though that rulemaking occurs in a particular program not normally having that kind of effect. The need to secure representation for the poor for all rulemaking of this sort is especially critical when it is remembered that rulemaking is frequently not an on-going process. It may be a one-time affair resulting in a rule to last for the indefinite future. Failure to assure adequate representation for the poor's interests in all rulemaking having a substantial impact on them as a separable group may, therefore, have long-term rather than short-term deleterious consequences in many situations.

It would be simple to formulate a nearly perfect solution to the problem under consideration if the poor were a monolithic or homogeneous group with its own democratically elected representative structure which could be called upon to articulate the particular interests of the poor wherever they are affected. The fact is that no organization, group, or individual can rightfully assert that it speaks for all the poor of this country in any truly democratic or representative sense. The poor are too heterogeneous and diverse; their interests too disparate and fractionalized. Even the sum total of all groups or organizations purporting to represent the interests of the American poor do not do so in any really democratic sense since most poor people are not members of any such group or organization. The interests

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[20] 5 U.S.C. § 1001(c) (1964), *as amended*, 5 U.S.C. § 551(4) (Supp. III, 1965–1967).

of the majority of poor may also sometimes diverge from the views of the many organized groups purporting to speak for some segment of them or for all of them. In addition, the leadership of some so-called "poor people's groups" may fall into the hands of persons who are in fact out of touch—or simply not concerned—with reflecting the views and promoting the welfare of the mass of the economically underprivileged. For these reasons, the creation of a truly representative agent to articulate and represent the heterogeneous interests of the poor is both impractical and infeasible. Consequently, the most satisfactory means of assuring adequate representation for the poor in federal rulemaking substantially affecting their interests will necessarily be imperfect. It also may have to be, in at least one sense, artificial and imposed from above.

Efforts to secure adequate representation for the economically underprivileged in all federal rulemaking having a substantial impact on them will have to move on two fronts to be successful. An attempt must be made to assure that federal agencies making rules of this kind independently seek to ascertain from the poor their views with respect to such rules. In addition, an attempt must be made to help the poor obtain affirmative representation for their interests in the rulemaking process. That is, some means must be devised by which to assure that these people have a competent, consistent, and aggressive advocate for their interests before federal agencies. Within the limits set by this two-pronged approach, a desirable solution should also be feasible—that is, realistically achievable; should take account of the fact that the interests of the poor needing representation may often be fractionalized and diverse; should be workable in an everyday, operative sense; and should be as economical as possible. Moreover, such a solution should be practical in the sense that the positive contribution it may make to the administrative process should overbalance any negative impact it may have on that process or other societal values. A desirable resolution of the problem under consideration should also make it as obvious as possible to the poor that their views will be adequately represented in rulemaking. This particular requirement may not directly enhance the proper functioning of the administrative process as such. It may, however, help to eliminate that portion of the poor's distrust of and dissatisfaction with government which stems from their perception that officialdom does not adequately consider their views when it makes policy affecting them.

II. ASSURING AFFIRMATIVE AGENCY ACTION TO ASCERTAIN THE VIEWS OF POOR PEOPLE

A. *Generally*

Officials responsible for promulgating rules substantially affecting the economically underprivileged segment of our society should, where feasible, increase their existing efforts to ascertain independently the views of poor people. They should also devise additional effective means by which to do so. This approach stresses the ability of the several agencies involved to develop and utilize affirmative procedures for obtaining, through direct and continuing contact with the poor themselves, the specific information that they should consider when they formulate their programs affecting the poor.

There is an analogy in Budget Bureau Circular A–85, which is entitled "Consultation with Heads of State and Local Governments in Development of Federal Rules, Regulations, Procedures and Guidelines." This document orders federal agencies to follow certain procedures geared to assure that there is adequate consultation with the heads of state and local governments prior to the promulgation of rules for the implementation of specific kinds of federal programs vitally affecting them. The Defense Production Act of 1950 also provided that "[a]ny rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations. . . ."[21] Similarly, federal agencies should follow procedures with respect to rulemaking that will assure, where feasible and practicable, independent agency efforts to ascertain directly from the poor their views with respect to proposed rules substantially affecting them.

B. *Some Specific Suggestions*

Agencies administering programs of concern to the poor should be urged to hold formal hearings—that is, oral public hearings—on proposed rules in close geographic proximity to the poor people affected. They should also be urged to obtain witnesses and solicit written views from among the affected poor and organizational representatives of the affected poor. Federal agencies should use special notice and hearing arrangements tailored to meet the peculiar problems of economically underprivileged persons in order to assure their effectiveness in accurately and successfully obtaining the views of such people. As an illustration, publication of a proposed regulation and notice of a public hearing in the Federal Register may constitute adequate notice for middle and upper income Americans whose agents or group representatives read that periodical, but it is usually inadequate by itself to apprise the poor. To faciliate affirmative agency action to ascertain the views of the poor, increased use of field surveys should also be encouraged. In addition, or as an alternative to some of the above suggestions, agencies should hold very informal conferences with the poor in their own neighborhoods in order to discuss with them contemplated rulemaking affecting such persons' interests.

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[21] Act of Sept. 8, 1950, ch. 932, § 709, 64 Stat. 819.

Agencies should also be urged to pay certain of the personal expenses of economically underprivileged witnesses in rulemaking hearings where that would help assure adequate representation for the poor. In this way the federal agencies may facilitate the appearance of an adequate number and variety of poor people's representatives in such proceedings. If economically underprivileged individuals must incur transportation, meal, or babysitting costs in order to testify on behalf of the poor, of if they must lose a day's wages, they should be reimbursed. Unlike the more affluent members of our society, poor people cannot afford to finance the extra costs involved in representing their own interests. At the present time most agencies are probably unable or unwilling to pay such expenses incurred by underprivileged persons seeking to represent the interests of the poor in rulemaking hearings. In order to remove any doubts as to their authority, federal agencies should be expressly empowered, in their discretion, to pay the basic personal expenses incurred by poor persons acting in such a capacity.

Each agency administering programs with a high impact on the poor should also be urged to constitute, where practicable, a formal advisory committee to apprise the agency of poor people's interests that should be weighed in the operation of its programs. These committees should be composed of persons who are themselves economically underprivileged, or the direct and close representatives of such persons. The committees should be continually kept informed of those activities of their respective agencies that specially concern them; and they should be consulted for their views before the agency makes any rules substantially affecting the interests of the economically underprivileged segment of our society. All expenses incident to the operation of such advisory bodies should be borne by the respective agencies. "Regulations for the Formation and Use of Advisory Committees" already exist.[22] These might be revised, expanded, and reoriented for this purpose.

In the future, the Administrative Conference of the United States should monitor the extent to which federal agencies actually do institute specific procedures like those just discussed. Government officials must be induced to increase their own affirmative efforts to ascertain the views of the poor with respect to rulemaking which affects them substantially. If the Conference finds that the recommendations urging voluntary agency action in this regard are not adequately affecting official behavior patterns in practice, it might then recommend that agencies be required to follow certain of the above specific procedures with respect to particular programs.

Although federal agencies might, if necessary, be required to follow some of the procedures outlined above in specific programs or situations, there are a number of reasons why federal agencies should not be *required* to follow certain of those procedures *in every case* where they engage in rulemaking substantially affecting the poor. These procedures may be completely superfluous in a number of cases because the views of the poor are unmistakably clear and a matter of public record. In addition, many of the specific procedures outlined as possible means to induce affirmative agency ascertainment of the poor's interests in agency rulemaking may be very impractical. The agencies have an undisputed need to conduct their affairs inexpensively, simply, conveniently, flexibly, and expeditiously. Requirements of the sort outlined above may be unusually difficult to draft and administer because of the peculiar problems in defining precisely those whose views the agency must solicit or appoint as representatives of the poor, when or where oral hearings or conferences must be held or field surveys taken, and the like. Whether an oral hearing should be held with respect to a certain proposed rule, precisely where and when it should be held, who exactly should be invited to testify, and whether a field survey should be made are all judgment questions. Someone, probably the rulemaking agency, must exercise some discretionary judgment. And to require useless hearings, conferences, or field surveys, endless lines of repetitive and inarticulate witnesses, and the like, would be to interject the worst kind of mischief into the administrative process, hamstringing rather than improving it.

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[22] Exec. Order No. 11,007, 27 Fed. Reg. 1875 (1962).

However, if federal agencies will voluntarily follow the previous suggestions in all those situations where they are feasible, practicable, and necessary to assure that officials are fully informed about the relevant interests of the poor, the agencies will help solve the problem under consideration. The proposals outlined in this section have the advantage of assuring self-starting and independent affirmative agency action to secure information directly from the poor concerning their position with respect to rulemaking substantially affecting them. An effective pipeline from the poor to those who are responsible for rulemaking decisions could result. The fact that the government would bear the sole or primary financial burden for this mode of assuring consideration of the poor's interests in rulemaking also enhances its attractiveness and effectiveness.

C. *The Inadequacy of Affirmative Agency Efforts*

Procedures to assure self-initiated affirmative official action to ascertain from the poor their views with respect to agency rulemaking will, if sound in their details, undoubtedly be helpful; but such procedures are entirely inadequate solutions for the problem at hand in at least one major respect. They do not completely compensate for that which the poor currently lack. Economically underprivileged people do not have the resources necessary to assure a technically sound and consistently available articulate presentation of their views concerning rulemaking to the appropriate agencies. Those segments of our society with adequate economic resources have long employed legal counsel—with their special technical proficiencies, knowledge, and skill as advocates—for these purposes. By the use of lawyers' professional abilities, the well-financed have assured that the kind of representation actually afforded their interests before government policy makers is qualitatively high, and much more effective than it could possibly be otherwise.

The poor are entitled to, and must have in order to make their interests known effectively, both the quantity and quality of representation in rulemaking before federal agencies that commercial corporations and labor unions consistently utilize. That necessitates furnishing the poor, in one way or another, with legal counsel for this particular purpose. Because the poor lack the personal and organizational resources to hire such skilled, persistent, and knowledgeable help, affirmative agency efforts of the kind discussed above, although useful, would still result in qualitatively inadequate representation in rulemaking for the economically underprivileged segment of our society. The reason for this is that existing sources of public and private legal aid to the poor, such as legal aid and public defender programs, do not usually provide the economically underprivileged segments of our society with representation in rulemaking. These programs are primarily, if not exclusively, concerned with serving the interests of individual poor clients in adjudicative or potentially adjudicative situations.

III. A CLEARINGHOUSE COORDINATOR?

The poor might obtain the quantity and quality of representation they need for their views in federal rulemaking if a well-financed clearinghouse-coordinator organization was created. Such an organization could systematically furnish all poor people's groups in this country with information concerning existing or proposed federal administrative regulations having a substantial impact on the poor. In addition, it could encourage and coordinate participation in federal rulemaking by organizations representing the economically underprivileged. Where necessary, this entity could also finance participation in rulemaking by various poor people's groups. That is, the clearinghouse coordinator might make conditional limited-purpose grants to poor people's organizations so that they could individually hire personal legal counsel to represent their views in a particular rulemaking matter. Such a clearinghouse coordinator would not itself attempt to play any direct role as an advocate in the rulemaking process. It would not act as a separate representative of the poor. An organization of this type could be financed by private contributions, government grants, or both, and, it could be constituted as an independent private body under the control of all of its constituent users in order to assure the maximum satisfaction of its clients.

Utilization of this kind of clearinghouse coordinator has several advantages as a solution to the problem of improved representation for the poor in federal rulemaking. It would encourage and facilitate more frequent and continuous representation of poor people's interests in the rulemaking process by organizations and groups representing some segment of the economically underprivileged. The clearinghouse coordinator might also result in representation for more of the many divergent and disparate interests present in that group in our society loosely characterized here as "the poor" than would otherwise be the case. In addition, the existence of such a body might induce a better and more accurate presentation of the views of the poor on many matters than might be the case with some other solutions. This is true because the source of the views and the representation of those views would be relatively close to the poor themselves. Since this solution would provide poor people's groups with funds to engage their own separate and personal counsel for the purposes of representation and advocacy in rulemaking proceedings, it would assure that the views of those organizations are accurately, articulately, knowledgeably, and aggressively presented to the agencies in question.

Still, such a clearinghouse-coordinator organization is probably an inadequate and inefficient solution to the problem at hand. It assumes that existing organized groups purporting to represent the poor can or will do an adequate job of protecting those people's interests with respect to federal rulemaking if such bodies are kept informed of the facts, their efforts are coordinated, and sufficient financing is made available to them. This is a questionable assumption, although admittedly it is hard to prove or disprove entirely on the basis of undisputed evidence. Existing poor people's organizations have sometimes been aware of proposed or existing rules of special concern to the poor generally, and yet have failed to act.[23] In many of these instances, their failure cannot be attributed entirely to a lack of organizational resources.

It should be reiterated that most poor people do not belong to organizations dedicated to protecting and advancing their interests; and the views of "poor people's groups," or of the controlling leadership of such groups, may frequently be out of touch with, or divergent from, the interests of the mass of the poor. The clearinghouse-coordinator proposal will not, therefore, consistently assure adequate representation in rulemaking for the collective interests of the poor as a general group. The device may assure representation in rulemaking only for the views of organized poor people's groups, or for the views of the leadership class of those groups. Depending on the specific case, that kind of representation may or may not be adequate to protect the interests of the mass of the poor people in this country.

The grant-financed efforts of numerous poor people's groups, each seeking to represent separately the interests of the economically underprivileged in federal rulemaking, may also be unduly duplicatory and therefore wasteful and unnecessarily burdensome to the administrative process. Furthermore, many administrative difficulties will appear in any effort to entrust a mandatory grant-making responsibility to the clearinghouse coordinator. Must every organizational applicant seeking funds with which to represent the poor in federal rulemaking be financed? If not, which groups in any given situation should be financed? These difficulties could be largely avoided if, depending on the facts of each case, the clearinghouse coordinator had the option of representing the interests of the poor itself or contracting with others to do so. In addition, freedom for each poor people's organization to hire its own separate lawyer for these purposes may be much more expensive and less effective than providing the poor with one specialist law firm working full time to represent their collective interests in federal rulemaking.

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[23] The Department of Agriculture's Commodity Distribution and Food Stamp programs for the poor are an example. Although poor people's organizations were aware of the existence of those programs and the Department rules under which they were operated, they did not seem to take any active interest in those programs until the last year or so.

For all of the above reasons the clearinghouse-coordinator approach to solving this problem is inadequate. It is too likely to result in uneven and inconsistent representation for the collective interests of the poor as a class in federal rulemaking. Moreover, it seems relatively uneconomical and inefficient. As subsequent discussion will demonstrate, a more desirable solution to the problem under consideration can be formulated. That solution could assure more adequate representation for the poor in federal rulemaking than the clearinghouse coordinator. At the same time, it could also incorporate, by one means or another, most of the special advantages of the clearinghouse coordinator.

IV. The Independent Poor People's Counsel

A. *Generally*

The most desirable solution to the problem under consideration would seem to be the creation of a people's counsel organization which would hire a staff to represent the interests of the poor in all federal rulemaking that substantially affects them.[24] Such a

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[24] This seems to be the general philosophy of the Feighan Bill, H.R. 17974, 90th Cong., 2d Sess. (1968), the text of which follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is fundamental to wise administrative rulemaking that, except in limited or unusual circumstances, persons whose interests may be affected be assured of an opportunity to participate in rulemaking through submission of data, views, or arguments to the responsible rulemaking agency. Rulemaking frequently affects persons without the resources necessary to keep themselves informed concerning proposed rules or to petition for rules or amendment or repeal of rules. Hence it is necessary that means be provided whereby, insofar as feasible, the interests of such persons may be protected in rulemaking and whereby the rulemaking process may be benefited by advocacy on behalf of such interests.

SEC. 2. Section 553, in chapter 5, Administrative Procedure, of title 5, United States Code, is hereby amended by adding thereto the following subsection:

"(f) The Attorney General is directed to enter into contracts with, or to make grants counsel would be an artificial representative *for* the poor in this process without any pretense of being a democratically chosen spokesman *of* the poor. This counsel, as an advocate, would be charged with the responsibility of separately and independently representing the collective interests of the poor as a class in all federal rulemaking. Where the interests of the poor on a pending rule are divergent, it would also be responsible for assuring the representation of those disparate views either in its own presentation or by other individuals or organizations. In performing its representational responsibility for the economically underprivileged, such an advocate would be under an affirmative duty to seek the advice and help of relevant sources of every kind, whether private or governmental, individual or organizational. It would be obliged to use every device available to keep in as close touch as possible with the needs and views of those whose interests it purports to represent. Although such a counsel's staff would probably be middle class, great pains should be taken, and special procedures instituted, to prevent it from being captured or dominated by a middle-class point of view.

As an aid in this respect, it might be desirable to establish official advisory committees to the poor people's counsel in each area of major concern such as welfare programs, housing, employment, education, and so forth. The membership of such committees should be composed of individuals who are as representative of the poor of this country as possible. These committees should not, however, become the exclusive source for the poor's communication with their people's counsel. There is always a danger that committee members, regardless of the care exercised in their appointment, may have divergent views and interests from the mass of the economically underprivileged. For this reason, the people's counsel should hold informal hearings among

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subject to appropriate conditions to, the National Legal Aid and Defender Association, or such other nationally organized nonprofit bodies with generally similar objectives as he may deem desirable, whereby such body or bodies may be provided with funds to enable them to participate in rulemaking in accordance with this section on behalf of interested persons who, because of their lack of personal resources, are unable effectively to do so. Any such body shall be deemed to be an interested person for the purpose of this section. Such body or bodies may contract with other persons to aid in effectuating the purposes of such contract or grant. The Attorney General is authorized to adopt such rules or regulations as may be appropriate to the administration of this subsection. He is authorized, further, after consultation with the agency involved, by order to make this section applicable to matters relating to public property, loans, grants, benefits, or contracts in circumstances where he determines that such matters so affect the interests of persons of limited means as to make it appropriate that, in connection with rulemaking with respect to such matters, a body or bodies receiving a contract or grant under this subsection should have an opportunity to represent such interests."

SEC. 3. There are hereby authorized to be appointed such funds as are necessary to carry out the provisions of section 2.

Senator Hart introduced the same bill in the Senate as S. 3703, 90th Cong., 2d Sess. (1968).

the poor on the larger and more important issues so that it can better represent their interests on those subjects. Close liaison between the people's counsel and Office of Economic Opportunity (OEO) community action groups, legal aid societies, civil rights organizations, and other poor people's groups throughout the country is also crucial. This will help to assure that the people's counsel will remain as reflective as possible of the real interests, views, and needs of those people in our society that it ultimately must serve.

B. *Specific Functions of the Poor People's Counsel*

The people's counsel would do everything necessary to represent effectively the interests of the poor in all federal rulemaking substantially affecting them. Such a body would perform most of the same functions for the poor with respect to the federal rulemaking process that Washington law firms perform for their well-financed clients. It would monitor the activities of federal agencies to assure that it is fully informed with respect to all rulemaking or potential rulemaking affecting the interests of the poor. When a federal agency proposes new rules of concern to the economically underprivileged, counsel for the poor would present their views on the desirability of the proposed regulations and actively lobby for the interests of the poor. This would include the drafting of substitute rules for the ones suggested by the government agency. Additionally, the people's advocate would formulate, and urge the appropriate authorities to adopt, entirely new rules and revisions of old rules substantially affecting poor persons. To perform these functions, the people's counsel would need an adequate staff not only of lawyers, but also of economists and other social scientists. This would assure that it will be capable of competently responding in kind to the arguments and technical data presented by the personnel of the various agencies with which it must deal.

In addition, the poor people's advocate would be charged with some of the specific obligations of the clearinghouse coordinator. That is, it would keep organizations representing the poor informed as to all federal rulemaking affecting their interests, and it would coordinate and facilitate those organizations' separate participation in such rulemaking if any of them had the desire and capacity to do so.

The people's counsel should also be authorized, in its discretion, to make contracts with other organizations as a means of helping to represent, in the rulemaking process, minority or divergent viewpoints with respect to the interests of the poor. Interjection of such minority or divergent views into the rulemaking process may be a function that the people's counsel will want to contract out to others because, by doing so, it might avoid some possible internal conflicts of interest in its organizational setup. The extent to which this contracting power is actually used ought to be left to the sole discretion of the people's counsel. Nevertheless, the expectation is that the staff of the people's counsel will normally perform all of the representation functions assigned to it.

The people's counsel would occasionally propose to the President or Congress, or both, new legislation (or executive orders) geared to institute reforms in administrative programs substantially affecting the poor. An agency may refuse to exercise its existing authority to make the kind of rules deemed necessary by the people's advocate to protect the interests of its constituency. Or an agency willing to make such rules may not have the authority to do so because legislation forbids it or fails to authorize it. In all of the above cases Congress can correct the situation by statute and thereby ensure the promulgation of rules satisfactory to the people's counsel. As a result, the advocate of the poor should be empowered to propose legislation to Congress or the President when that would be an aid in performing its primary responsibility—effectively representing the poor's collective interests in federal rulemaking.

The people's counsel should also be empowered to play an independent role in the judicial review of federal administrative rules. As a representative of the poor, the counsel should be able to challenge in court, under its own name, the validity of any federal rule substantially affecting poor persons. Only with this authority will the views of the people's counsel have any creditable weight with the agencies before which it is to operate. The image and attendant effectiveness of the people's advocate will be greatly enhanced if federal agencies know that the people's counsel can freely institute judicial review of agency rules under its own name and solely on its own initiative. Absent that authority, the people's counsel might be totally ignored by the administrative establishment; officialdom would know that there is little bite behind the counsel's bark. Power to seek judicial review of an agency's rules on the ground that they are unauthorized, are in conflict with a statute, are unconstitutional, or have been promulgated without the required procedure is, therefore, very important. The poor's advocate should not be forced to give up after it unsuccessfully opposes the promulgation of a certain rule that is antithetical to the interests of the economically underprivileged if that rule is vulnerable to attack in the courts.

The ability to sue in its own name as an official representative of the poor is also especially important to the people's counsel because that right frees the counsel from any dependency on particular poor persons who would otherwise have to be the named plaintiffs in such suits. Since it is responsible for representing the collective interests of the poor, the people's counsel should not be put in the position of having to reconcile that duty with the individual interests of a particular poor person acting as official plaintiff in a court case. In addition, if the poor people's advocate can sue in its own name, many administrative difficulties and extra expenses can be avoided. Congress should therefore, specifically vest the people's counsel with this right. Delegation of that authority to such a counsel would not, of course, preclude other individuals and organizations with standing from seeking judicial review of federal agency rules on behalf of poor people's interests.

A very broad precedent supporting the right of a representative body to seek judicial review of administrative action adversely affecting those whose interests it seeks to protect is *Office of Communication of the United Church of Christ* v. *FCC*.[25] That case held that a church has standing as a "party in interest" to seek judicial review as a representative of its members as listeners whose interests the FCC is required to protect. Since that organization was a voluntary-membership body seeking to assert the rights of persons who freely chose to join it, the *Church of Christ* case might be distinguished from the situation under consideration here. However, if an act of Congress expressly authorized the people's counsel to seek judicial review of federal rules having a substantial impact on the poor, in its own name as an official representative of such persons, the standing of that counsel would be clear. Of course, a question might be raised whether a case or controversy exists in a judicial proceeding pitting an artificial poor people's representative accorded such a statutory right to judicial review against an agency whose rules are challenged on behalf of the poor. However, it seems clear that one exists. A statute of Congress would impose a legal duty on the people's counsel to protect the interests of underprivileged persons in federal rulemaking—a duty that would include attempts to invalidate improper rules in court; and the various federal agencies have an adverse legal obligation to defend the integrity of their rules against attack by others. Some might argue that *Muskrat* v. *United States* [26] casts doubt upon the ability of such a people's counsel to sue in its own name as a representative of the poor, even after Congress specifically empowers it to do so. But that case is probably no longer the law.[27]

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[25] 359 F.2d 994 (D.C. Cir. 1966).

As a wise allocation of its resources, the people's counsel may frequently elect to assist other agencies representing the poor to prosecute court cases relating to the validity of federal administrative regulations instead of instituting such suits itself. To this end it might distribute to appropriate legal aid organizations memoranda explaining that specified regulations may be subject to successful attack in the courts. In addition, the people's advocate could give technical or financial aid to a local legal aid organization attempting to prosecute, on its own, a test case concerning some federal rule that is inconsistent with the poor's interests. The people's counsel could also generally coordinate the efforts of legal aid groups with respect to the judicial review of federal agency rules.

The people's counsel should also be empowered to intervene under its own name on behalf of the poor in those agency adjudicative proceedings substantially affecting the economically underprivileged. The poor as a group may have as vital an interest in the outcome of certain agency adjudication as they do in most rulemaking proceedings affecting them. Many very important administrative policies are established as a result of ad hoc agency adjudication. At present, the collective interests of economically underprivileged people are inadequately represented in such federal administrative adjudication; effective participation in those proceedings requires certain skills and expertise not available to most local legal aid societies who have had little experience with the intricacies of adjudication before federal agencies. Therefore, apportioning this function to the poor people's counsel seems wise.

Representation of the poor in agency adjudicative proceedings is closely and intimately tied to the counsel's other responsibilities. Assigning this function to the people's advocate will economically utilize the expertise in federal administrative law that it will necessarily acquire through the performance of its other duties. However, the people's counsel will not be empowered to *initiate* adjudicative proceedings before federal agencies in its own name; as an official representative of the poor, it will be limited to participating in such proceedings as an intervenor. Where necessary, traditional channels of legal aid can be expected to initiate such agency adjudicative proceedings in the name of individual economically underprivileged clients.

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[26] 219 U.S. 346 (1911) (holding that Congress could not authorize named Cherokee Indians to institute suits on their own behalf and on behalf of other Cherokees having similar allotments to determine the validity of acts of Congress restricting alienation of certain land and increasing the number of persons entitled to share in it).

[27] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 374 (1959).

Ordinarily the people's counsel should not perform the responsibilities of an ombudsman or personal legal counsel. That is, it should not normally handle the individual grievances of, or seek remedies for, particular poor clients. An ombudsman or personal legal counsel becomes preoccupied with the details of numerous individual claims and is therefore likely to lack a sufficiently broad independent perspective about the best ways of serving the poor as a whole. If it acted to represent particular clients, the proposed body's individual caseload would be much larger than its job of affirmatively representing the poor as a class in federal rulemaking. As a result, the latter function may be obliterated by the former function. In addition, since all citizens, rich or poor, may experience administrative arbitrariness and ineptitude, all should have access to an ombudsman. But to be effective, the office contemplated here must concentrate on and become expert in the special problems of the poor. It must look at these problems and proposed solutions solely from the viewpoint of the poor. Furthermore, the people's counsel should be primarily concerned with affirmatively representing the interests of such individuals prior to, and as a means of avoiding, their need for an ombudsman; but because of the nature of an ombudsman's responsibility, a people's counsel charged with that additional function may see the needs for affirmative representation in rulemaking primarily in terms of the poor's appearance in its office for ombudsman's help. However, there may be very rare occasions when the people's counsel should be able to represent a particular person because that is the best or only means by which to test a certain agency policy affecting the poor as a class. In those cases it should be free to do so, but only if absolutely essential to its primary function as advocate for the collective interests of the poor in federal rulemaking.

Finally, it should be recognized that the interests of the poor and the interests of higher income groups may sometimes be identical with regard to certain rulemaking or agency adjudication. To assure adequate representation for the economically underprivileged, the people's counsel must have the independent authority to participate on behalf of the poor in *all* rulemaking and agency adjudication of concern to those people. However, a wise allocation of the advocate's resources should lead it to concentrate its efforts on representation of the poor in those situations where the interests of the poor are not adequately protected by the endeavors of other more affluent groups.

C. *Locating and Structuring the People's Counsel*

1. *A Government Office of People's Counsel*—The proposed people's counsel might be constituted as a permanent, single-purpose, and relatively independent federal government office located outside of any agency before which it would have to represent the poor. A number of arguments of varying merit have been made in favor of making the poor's advocate an integral part of the governmental establishment. It has been contended that federal agencies might be more receptive to a presentation of the poor's views by another part of the official establishment than by outsiders. Therefore, the argument continues, as a part of the governmental structure the people's counsel might be more effective than if it were outside of that structure. If it were part of the official establishment, such a people's counsel might also be accorded access to useful information and resources that it otherwise might not be able to obtain. Furthermore, indicating that representation of the poor's interests has special importance by making it a part of the government itself might give the economically underprivileged the feeling that the official establishment really cares about their interests. As a government office, the people's counsel might also have a certain prestige and respectability not otherwise obtainable which would facilitate the recruitment and retention of a competent staff.

In practice, many of these assertions about the advantages of placing the people's counsel inside of government may prove to be unrealistic or erroneous. Moreover, location of the people's counsel as a part of government may actually be disadvantageous for a number of reasons. As a full-time employee of the United States Government, the poor's advocate is more likely than otherwise to become, at least over time, a captive of the establishment—out of touch with the poor, docile, and therefore ineffective. After all, a certain *in terrorem* effect would always exist because the appropriations for the office would continually be subjected to congressional approval. And the professional associations of the staff of the people's counsel under these circumstances would be with other government officials, all working for the same principal, and all having common interests and problems in the long run.

The idea that a government agency can do an effective job because it would be a member of the team is chimerical. One of the basic strengths of our legal system is its reliance on the adversary system. The handling of things by a member of the team smacks of "Big Brotherism." The poor would probably lack confidence in a people's counsel who, although charged with representing their interests, was part of the very government establishment they wanted to influence. The poor might well believe, regardless of actual performance, that any full-time government employee purportedly representing their interests was really not doing so. Furthermore, the underprivileged segments of our society seem to reject the basic philosophy underlying the approach that would appoint a government official to represent their interests. In the past few years the more militant elements of the poor have demanded that the poor themselves be accorded a direct voice in controlling their destiny. Finally, locating the people's counsel as a part of the federal establishment may make it less effective than otherwise possible because its freedom to innovate and experiment may be curtailed by government red tape and bureaucratic requirements.

There is some precedent supporting the suggestion that a special government house counsel be created to represent a group unable to represent effectively its own interests before federal agencies because of its large size, amorphous nature, and lack of organization. There was an independent Office of Consumers' Counsel charged with asserting consumers' interests in bituminous coal proceedings before the National Bituminous Coal Commission.[28] The Department of Agriculture also had, at one time, a Division of Consumers' Counsel which participated in proceedings within that department on behalf of consumers.[29] A similar position seems to have existed for a period in the National Recovery Administration, the Department of Labor, and the Department of the Interior.[30] More recently, President Johnson announced the creation of the Office of Consumer Counsel in the United States Department of Justice.[31] This new office did not begin to function until the very end of 1968 because the first appointee died before he could assume his duties. The status of the office is now unclear due to the change in national administrations. In any case, the newly created Office of Consumer Counsel would not be an adequate solution for the problem at hand since the interests of the poor affected by the rulemaking process are substantially broader than those interests deriving from their status as consumers.

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[28] 1968–69. U.S. GOVERNMENT ORGANIZATION MANUAL 687, 708.

[29] *Id.* at 691.

[30] *Id.* at 687.

[31] *See* White House Press Conference of Betty Furness, Special Assistant to the President on Consumer Affairs, and Attorney General Ramsey Clark discussing the establishment of this office (mimeo Feb. 6, 1968).

History may support the idea that a people's counsel of the sort contemplated here should not be constituted as a part of the government establishment. Almost all of the consumer's counsel offices organized as separate entities within the federal establishment have atrophied and disappeared. Most of them seem to have faded because, among other things, they were ineffective and made no significant contribution to the administrative process. Although not completely clear, the reasons for the conspicuous lack of success of these offices seem to have included their intimate connection with the government establishment (as an official and integral part of it), and their structural position within that establishment—that is, the fact that they were located inside of the very agencies before which they were to represent the consumer's interests.[32]

2. *A Private Office of the People's Counsel*—A second means of constituting the people's counsel is to utilize a private organization outside of government for these purposes. By relying on a body outside the federal establishment, the people's representative in rulemaking proceedings may be able to be more closely tied to and identified with the needs of the poor than would be possible if it were an official organ of the United States Government. A nongovernmental body may also be able to communicate more effectively with the poor than an official one. As a private organization separated from the government hierarchy, it may be less susceptible to being captured by the ideas and values of the government agencies before which it would represent the interests of the poor. A private people's counsel may also be less susceptible than a similar public counsel to intimidation by government agencies; if so, the private organization would be a more aggressive and persistent representative of the poor's interests in rulemaking than a public body.

As suggested above, such a private body may also be more flexible and thus better able to experiment and innovate in the performance of its assignment than a government-based equivalent. This greater freedom may be especially useful with respect to recruiting a staff and administering its activities. Moreover, this freedom may mean that a private people's counsel would be more efficient in the long run than a government body. As noted earlier, the poor are likely to have greater confidence in a private counsel's representation of their interests than in a public counsel's performance of that job because their advocate would not be part of the very establishment which they are trying to influence. The actions of a private counsel may also be more visible to the poor than the actions of a public counsel which could easily get lost in the huge federal bureaucracy and become relatively invisible to outside viewers. This greater visibility might make a private counsel more responsive to the interests of the poor and a greater source of satisfaction to them.

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[32] On the operation of these consumer counsels *see generally* R. Baker, The National Bituminous Coal Commission: Administration of the Bituminous Coal Act, 1937–1941 at 221–53 (1941); H. Johnson, The Blue Eagle from Egg to Earth 295–96 (1935); L. Lyon, P. Homan, G. Terborgh, L. Lorwin, C. Dearing, & L. Marshall, The National Recovery Administration 123–28, 210–14 (1935); Lewis, *The "Consumer" and "Public" Interests Under Public Regulation*, 46 J. Pol. Econ. 97, 103–06, 106 n.10 (1938); E. Nourse, J. Davis, & J. Black, Three Years of the Agricultural Adjustment Administration 391–95 (1937).

On the other hand, it has been urged that such a private organizational representative of the poor might not be as influential or effective in rulemaking proceedings as an official agency of the United States charged with the same obligation. By virtue of its official status, a public people's counsel charged with representing the poor may be offered greater cooperation and opportunity for participation in rulemaking affecting the poor than a private organization charged with the same duty. In addition, a private people's counsel may not be, in and of itself, as effective a mechanism as a public people's counsel to convince the poor that the federal government really wants their interests represented in its rulemaking process. A more likely disadvantage of a private body might be its greater susceptibility to capture by the interests of some small segment of the poor, with the result that it would only serve the interests of that special group among the poor rather than the interests of the poor as a whole. However, this disadvantage can be offset by structural devices geared to avoid that situation; and it must be weighed against the specific advantage that the private organization is less susceptible to being captured by the "government view" and more likely to be in close touch with the real needs of the poor.

3. *The Public Broadcasting Corporation Model: A Compromise Solution*—A third solution to the problem of properly positioning the people's counsel is a beneficial compromise between the alternative of locating the advocate for the underprivileged inside the federal government and locating it entirely outside and separate from that establishment. The poor's representative described herein could be constituted as a completely independent, federally chartered corporation similar in most respects to the recently created Corporation for Public Broadcasting[33] or

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[33] 47 U.S.C. § 396 (Supp. III, 1965–1967).

the long established American National Red Cross.[34] These organizations are hybrid public-private bodies. As such, they provide a model for the people's counsel which may combine the advantages of the purely public body with the advantages of the purely private body and minimize the disadvantages of each.

The Corporation for Public Broadcasting, for example, was created by a special act of Congress as an independent, nonprofit, and no-stock entity.[35] It is headed by a bipartisan body of fifteen members whose qualifications and fixed terms of office are set by statute. They are appointed by the President with the advice and consent of the Senate and are authorized to make policy for the body and direct its affairs. The act creating the corporation specifies its purposes and powers. It also expressly authorizes the body to obtain grants from, and make contracts with, individuals and private and governmental organizations and institutions. According to the statute, the Corporation for Public Broadcasting must submit detailed annual reports to the President and Congress outlining the activities, financial condition, accomplishments of the organization, and any recommendations it deems appropriate. In addition, the statute requires an annual audit of the corporation's books by an independent certified public accountant. The financial operations of the body and its grantees' use of corporation funds may also be audited by the United States Government for those fiscal years during which federal funds are involved.

But the public broadcasting body is otherwise independent of federal authority and is more nearly private than public. The statute specifically declares that it is not "an agency or establishment of the United States Government." [36] Neither the directors of the corporation nor its agents are federal employees by virtue of their connection with the organization. In addition, full-time federal government employees are specifically excluded from appointment to the governing board of the corporation. Finally, the enabling act expressly notes that nothing contained in any of its provisions "shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control . . . over the Corporation or any of its grantees or contractors. . . ." [37]

The private corporate structure of a people's counsel modeled after the Corporation for Public Broadcasting assures it the advantages of a purely nongovernmental body. An organization of this kind is effectively insulated from federal control of its day-to-day policy determinations. It can aggressively represent the interests of the poor before federal agencies and advocate views distasteful to officialdom without fear of crippling government intervention. Such a body is also free, because of its private organizational structure, of all of the operational rigidities and inflexibility associated with a government agency. Like a purely private entity, such a corporation is not bound by the rules of the federal bureaucracy with respect to such things as the hiring and compensation of staff, and the means by which its business is conducted. Consequently, this corporate entity will have as much freedom to experiment and adapt its practices to changing exigencies as a purely private organization. The structure of a corporation of this kind also permits it to draw very easily on both public and private means of support without unduly complicating the organization's affairs or threatening its independence in the way that a government agency's independence would be threatened.

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[34] 36 U.S.C. § 1 (1964).

[35] 47 U.S.C. § 396 (Supp. III, 1965–1967).

[36] 47 U.S.C. § 396(b) (Supp. III, 1965–1967).

[37] 47 U.S.C. § 398 (Supp. III, 1965–1967).

In addition, a people's counsel corporation of the type under discussion here, like a purely private entity of that sort, can be more closely tied to, and identified with, the needs of the poor than a similar government body. This can be achieved by stipulating certain specific qualifications for appointment to the organization's private governing board. Similarly, an entity modeled after the Corporation for Public Broadcasting may also be able to communicate with the poor more easily and flexibly than if it were a direct part of the federal establishment. Because this kind of entity is not part of the "official government team," it may be less susceptible than a purely public body to being intimidated or captured by the ideas, values, and interests of the agencies with which it deals. The economically underprivileged may also have more confidence in a people's counsel structured in this way than in one located within the federal government; it is apparently independent of federal influence and is controlled by a private board structured to reflect the interests of the poor. The actions of such a government-chartered but independent counsel may also be more visible to the poor than a similar government counsel lost inside the vast federal establishment.

If the people's counsel were constituted as a body like the Corporation for Public Broadcasting, it would also have many of the important advantages of a government-based people's counsel. In quasi-public form, it may have higher status and prestige than a purely private people's counsel. Thus, it might well be able to secure a more qualified staff and a stronger board of directors than could a private body. Such an organization can easily be funded by the national government and can deal to some extent as an official equal with federal agencies. As a quasi-official body, federal agencies might be more receptive to its presentation of the poor's views than if those views were presented by a purely private body; and, a quasi-official people's counsel might be accorded access to information and resources not as easily obtainable by a purely private entity. This seems to have been true of the Red Cross, for example. Constituting the people's counsel as such a quasi-official body might also give the poor a feeling that the federal government itself really cares about them and is attempting to ensure fair representation for their views with respect to rulemaking that vitally affects their interests. At the same time, the independent structure of the people's counsel organization assures the poor that a meaningless "Uncle Tom" has not been created.

The above discussion suggests that the best way of structuring the people's counsel is to establish it as a quasi-public body modeled on the Corporation for Public Broadcasting. At the start, such a body would, of course, require action by Congress. After it was set up, it would not be dependent on the government to any appreciable extent except perhaps for part of its financing—an aspect which will be discussed below. Careful drafting of the enabling statute should assure the creation of an effective and meaningful advocate for the poor in all federal rulemaking substantially affecting them.

D. *Financing the People's Counsel*

Financing the people's counsel raises additional problems. It is clear that a rather large infusion of new money will be needed to support such an entity on a long-term, continuing, and effective basis. Resources currently available to the poor and their organizational representatives are totally inadequate to support this new responsibility in any satisfactory way. The source of the extra money required could be federal, private, or both. Utilization of federal money for this purpose has some distinct advantages. The function which must be performed is too important and urgent a part of the federal administrative process to entrust its support to the uncertainties of private fund raising. Only an infusion of federal money can guarantee, relatively soon, the kind of funding that is necessary for this project to assure proper, immediate representation of the type contemplated here.

The circumstances of the era in which we live suggest that it is too late to talk solely in terms of a short-term demonstration project. What is needed—and needed now—is adequate representation for the poor in federal rulemaking on a permanent, reliable, and quantitatively sufficient basis.

However, it may be possible to secure the funds needed to promote a quasi-public people's counsel from nongovernmental sources. Large charitable foundations might provide a long-term guarantee of adequate revenue, especially if they understood the vital and special importance of this particular project. In addition, individual and business contributors might be induced to support such a body in the same way that they support charities such as legal aid societies. However, to attract substantial gifts of private funds from individual or business donor, the people's counsel corporation must be a tax exempt charity. In order to clear up any doubts on that subject, Congress should specifically stipulate in the statute creating the people's counsel that it is tax exempt for these and other purposes.

A number of arguments suggest the long-term desirability of financing such a people's advocate exclusively from nongovernment funds if that should prove practical, feasible, and realizable sufficiently quickly. As a contractor with the federal government—bound to provide in return for monies furnished the representation required—the people's counsel becomes, to some extent at least, a tainted instrument of the government in the eyes of the poor. Even if it is not true, the poor may feel that their counsel will not bite the hand that feeds it. Furthermore, because of the grant-making agency's authority to discontinue grants to the people's counsel, that agency will be in a position to exert pressure on the advocate for the poor which might be deleterious to the most vigorous performance of its duties. If the people's counsel even fears that aggressive and persistent representation in rulemaking of certain unpopular views favoring the poor might induce a withdrawal of federal funds, it may become timid, lethargic, and unnecessarily cautious. In addition, a grant of federal funds is rarely made without relatively detailed conditions, and such strings might remove some of the desirable flexibility and capacity to innovate and experiment normally possessed by a privately financed operation of the same sort.

However, the above objections to the use of federal funds are not sufficiently important to be controlling if government money is in fact necessary to finance such a people's counsel quickly, adequately, and on a long-term basis. If government financing is required, the OEO might logically be considered as a funding agency. The sole purpose of the OEO is to help the impoverished of this country. In addition, it is in an especially good position and has the specialized resources to evaluate the faithfulness and effectiveness with which the people's counsel represents the interests of the poor. Through its Community Action Programs, Vista Volunteers, Legal Service Offices, and Job Corps Centers, the OEO is in daily, intimate contact with the poor. It also has the advantage of a broad and continuing experience with the poor and their special needs and problems, and a particular interest in providing funds to secure adequate legal representation for the economically underprivileged. Empowering the OEO Legal Services Program to make grants to a people's counsel for the purposes outlined in this Article might just round out this federal agency's current attack on inadequate legal representation for the poor generally.

On the other hand, there is a very persuasive reason to appoint another federal agency as the grant-making body. The OEO is one of the most significant federal agencies making rules with a substantial impact on the poor. That body will, therefore, be one of the agencies before which the people's counsel will continuously have to represent the collective interests of the poor. If the OEO were designated as the agency to finance the people's counsel it would necessarily be put in a position whereby it could influence—perhaps detrimentally—its grantee's representation of the poor with respect to the OEO's rulemaking. Regardless of the purity of the OEO's actions in this regard, such a structural situation might cause the people's counsel to be unnecessarily timid in representing the poor's interests before the OEO. Designation of the OEO as grant maker for this purpose would also make less credible to the poor the efforts of the people's counsel to represent their interests before the OEO. Even if it were untrue, the poor might think that their counsel would be likely to play ball with its benefactor. For these reasons, any government grantor of funds to support the people's counsel should not be an operating agency whose programs have a large impact on the poor.

V. SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT

A. *Generally*

Even if the above recommendations are adopted, there is inadequate assurance that the interests of the poor will be represented in federal rulemaking unless some means is devised by which to guarantee such persons notice of proposed regulations substantially affecting them and an opportunity to submit their views to the proper authorities. The required notice and opportunity-to-participate provisions of section 4, subsections (b)–(e) of the APA might be adequate for this purpose were it not for the blanket exemptions from those provisions found in section 4(a).[38]

A majority of the federal administrative programs substantially affecting the poor are excepted from the notice and opportunity to participate requirements of subsections (b)–(e) by the exemption for matters relating "to public property, loans, grants, benefits or contracts" found in subsection (a)(2). This means that in rulemaking for most programs of special concern to the poor, federal agencies need not give any notice of proposed regulations in the Federal Register. Similarly, in the excepted situations, federal agencies need not allow "interested persons," including the poor or their representatives, to participate in rulemaking "though the submission of written data, views, or arguments" or through "the right to petition for the issuance, amendment, or repeal of a rule." Of course, the relevant agencies have the discretionary authority to give notice and allow participation in the excepted situations, but they are under no obligation to do so.

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[38] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1964):

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants. benefits, or contracts.

(b) General nature of prepared rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law. The notice shall include—

- (1) a statement of the time, place, and nature of public rulemaking proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

B. *Should the APA Be Modified To Cure This Problem?*

Question 3 of the special questionnaire sent to the relevant federal agencies as part of this study asked:

> In developing and promulgating rules for the implementation of each of these programs [with a substantial impact on the poor], does your department or agency follow the provisions of 5 U.S.C. 533(b)–533(e) [APA section 4, subsections (b)–(e)], even when the rulemaking proceeding is excepted from these provisions by one of the exclusions in 5 U.S.C. 533(a) [APA section 4(a)]? If you do not do so, please describe the procedures you do employ in rulemaking in each of these programs.

The overwhelming majority of answers to this question indicated that the reporting agencies do not follow the notice and opportunity-to-participate procedures of subsections (b)–(e) when their rulemaking is excepted from them under section 4(a).[39] Only a very few agencies indicated a contrary practice, and even these confessed to inconsistency in this regard.[40] In addition, rulemaking procedures actually utilized by the agencies in the excepted situations are inadequate substitutes for those found in subsections (b)–(e) of APA section 4. Substitute procedures are not consistent and do not, in most cases, assure adequate notice to the poor or a sufficient opportunity for their participation. In some cases not governed by subsections (b)–(e), the agencies simply determine the rule they think appropriate and promulgate it without notifying or consulting with anyone outside the agency.[41]

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[39] The Department of Agriculture, for example, reported that "the Department does not follow the provisions of 5 U.S.C. 553(b)–553(e) in developing and promulgating rules for the programs listed above"; the Department of Housing and Urban Development reported that "the provisions of 5 U.S.C. 553(b)–(e) are not followed for programs covered by the exemption;" and the Veteran's Administration reported that "in developing and promulgating rules for the implementation of veteran's programs we do not generally follow the provisions of 5 U.S.C. 553(b)–553(e), as our rulemaking procedures are excepted by the provisions of 5 U.S.C. 553(a)(2)."

[40] For example, the Department of Labor reported that "in cases of rulemaking excepted from 5 U.S.C. 553 the Department of Labor does nevertheless follow the provisions of section 533 when it deems it appropriate or desirable to do so." The Department of Transportation also reported that while it does follow § 553(b)–(e) [APA § 4, subsections (b)–(e)] for some programs exempted from § 553 (APA § 4), at the present time it does not do so for most such exempted programs.

[41] For example, the Small Business Administration reported that "under the exemption in 5 U.S.C. § 553(a), rules for [the Local Development Company Loan Program and the Economic Opportunity Loan Program] are initially published and issued in the form adopted by the agency." The Department of Labor reported as to rulemaking exempted from § 553 (APA § 4) that it "frequently gives public notice of proposed rulemaking and invites public participation therein when the proposed rule is expected to have widespread effects and when for any other

In other cases, agencies give notice to, and engage in informal consultation with, whomever they happen to think appropriate under the circumstances.[42]

Question 4 of the questionnaire asked the same federal agencies responding to the prior question the following:

> What disadvantages, if any, do you see in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) [APA section 4(a)] *as they may apply to* . . . [your programs with a substantial impact on the poor], and thereby would make the provisions of 5 U.S.C. 553(b)–553(e) [APA section 4, subsections (b)–(e)] applicable to all rulemaking relating to these programs? (Assume that the several exceptions now in sections 553(b) through (e) would remain unchanged.)

Although a number of agencies saw no substantial disadvantages in eliminating the blanket exclusions of subsection (a) under the specific conditions indicated in the above question,[43] most respondents thought it undesirable to eliminate any of these exclusions. The reasons advanced for maintaining the section 4(a) exceptions to the requirements of subsections (b)–(e) varied: elimination of the exceptions is unnecessary;[44] it would make rulemaking too cumbersome and thereby deprive the agency of desirable and necessary flexibility in the adoption of its rules;[45] it would cause needless and injurious delay in the final pro-

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reason it is considerd desirable to obtain the views and objections of those to whom the rules would apply. Otherwise, the rules are evaluated by the bureau concerned, and are adopted and published in the Federal Register."

[42] For example, the Tennessee Valley Authority reported that "the formulation and implementation of TVA policies in carrying out its program of resource development use are excluded from the rulemaking procedure of 5 U.S.C. § 553 by the provisions of subsection (a). Such policies and the implementation thereof are determined by the TVA Board and are recorded for internal guidance in an administrative code. They are brought to the attention of interested units of government, organizations, and institutions, through discussion and negotiation and appropriate press releases." The Department of Agriculture responded with respect to its food program that it does not follow § 553(b)–(e), but that "before their adoption, proposed regulations and amendments thereto are discussed with district personnel of the Department and with representatives of the State agencies, in general conferences, regional conferences or operating as task force groups." (Note that recipients of these food programs or their representatives were not among those listed as being consulted.)

[43] The Department of Labor reported it "does not anticipate substantial disadvantages to the programs listed in response to question 1 from the elimination of the exclusions now in 5 U.S.C. 553(a)" and the Department of Transportation reported that "we would not object to elimination of the exemptions for loans and grants. The Department is, in fact, not taking advantage of the exclusion in the case of Federal airport aid, and is considering following this course in the case of its other grant and loan programs."

[44] For example, the Department of Health, Education, and Welfare replied that "we have found that in the grant-in-aid field, publication of notice of proposed rulemaking in the Federal Register is not the most suitable way to focus the attention of interested persons, agencies and groups on the proposal."

[45] For example, the Tennessee Valley Authority responded that "application of the rulemaking procedures of 5 U.S.C. § 553 to the TVA resource development program would decrease its flexibility and hinder its effectiveness." Similarly the Department of Agriculture reported that "it would be unnecessarily cumbersome to apply the procedures of the statute and might deprive the Department of a desirable flexibility in the adoption of rules."

mulgation of rules for some programs; [46] it would cause a tremendous increase in agency work and operating costs; [47] it would be insufficient as a means to assure in all cases adequate participation by the relevant people in rulemaking and, therefore, might sometimes needlessly require an agency to follow two sets of procedures in order to involve properly the right persons; [48] it might put the agency and those most directly affected by its policies in an adversary position, thereby discouraging mutual cooperation toward obtaining the best solutions to common problems; [49] and, it might conflict with some specific provision of the agency's enabling act.[50]

In light of the injurious effect which these exemptions have on the ability of the poor to represent their interests in rulemaking, the above reasons for continuing them for programs substantially affecting the poor do not seem persuasive. It should be noted that elimination of the across-the-board exemptions in section 4(a) would still leave section 4(b)(B) in force. This provision states that "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor, in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest," it does not have to utilize such procedures in its rulemaking. Furthermore, if the policies expressed in subsections (b)–(e) are presently sound respecting unexcepted situations, they should be equally sound with respect to "public property, loans, grants, benefits and contracts." The reason for this is that the previously noted objections to the application of subsections (b)–(e) to the classes now excepted by subsection (a) can also be leveled against the applicability of the former provisions to rulemaking not presently excepted by subsection (a). Consequently, there are no persuasive arguments which preclude repeal of all exemptions contained in section 4(a) *as they may apply to programs with a substantial impact on the poor.*

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[46] The Department of the Interior stated, for example, that "we would not favor the elimination of the exclusions in 5 U.S.C. 553(a) since to do so could produce injurious delays in the adoption of regulations." Similarly, the Small Business Administration replied that "it could complicate or delay rulemaking," and the Department of Agriculture reported that the "F.H.A.'s operations would be seriously delayed and reduced in effectiveness if its rules were subjected to the mandatory notice and public procedure requirements."

[47] For example, the Veteran's Administration responded that elimination of the section 553(a) exclusions "would lead to heavier workloads within the agency and a resulting increase delay in awaiting benefits thereunder." In addition, although the Department of Labor saw no substantial drawbacks to repeal of the exemption in section 553(a) it did note that it "would of course, substantially increase the cost of Government."

[48] For example, the Office of Economic Opportunity responded that "the major disadvantage in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) is that it would require OEO to follow two sets of procedures, those of 5 U.S.C. 553, which would generally prove ineffective in reaching the poor, and those currently followed, particularly by CAP, which have proved effective and are constantly being made more effective."

[49] The Tennessee Valley Authority responded that "procedures for the formulation of policies under the rulemaking requirements of 5 U.S.C. § 553 would place TVA and its distributors in an advisory position where the tendency would be for each distributor or group of distributors to try to gain advantage in the formulation of the policy rather than working with TVA and other distributors in a mutual effort to find the best possible solution to each problem as it arises."

[50] For example, the Department of Health, Education, and Welfare reported that with respect to some programs, "the authorizing statute provides for rulemaking procedures other than those provided by the APA . . . ."

The exemptions contained in section 4(a) of the APA might, therefore, be amended to require federal agencies to follow the provisions of subsections (b)–(e) in *all situations where their rulemaking has a substantial impact on the poor.* A statutory change of this kind is somewhat broader than, but generally similar to, that contained in a recent bill introduced by Congressman Feighan of Ohio.[51] Congressman Feighan's bill would authorize the Attorney General of the United States to lift the exemption contained in section 4(a) whenever he deems that desirable to protect the interests of the poor. Once the Attorney General lifted the exemption as to a particular rulemaking situation because the "interests of persons of limited means . . . make it appropriate," any "interested person," rich or poor, could presumably assert rights to participate under subsections (b)–(e). As noted earlier, agencies have unlimited discretion to permit public participation in situations excepted by section 4(a), but they are not required to do so; the Feighan bill would only extend this same discretion to the Attorney General where he decides the interests of the poor require it.

Some might argue that the Feighan bill, or a broader revision of section 4(a) expressly requiring federal agencies to follow the provisions of subsections (b)–(e) for *all* rulemaking having a substantial impact on the poor, raises serious fifth amendment due process questions of an equal protection nature. The argument is that statutory revisions of this sort give the poor an unfair and irrational advantage over all other Americans. The proposed modifications would require federal agencies to provide notice and an opportunity to participate in normally exempted situations where the poor would be benefited by such rights; but these modifications would not oblige agencies to provide these opportunities where they would only benefit the more affluent. However, this classification is rational because, unlike the poor, the American upper and middle classes have adequate alternative means for protecting their interests in rulemaking.

To protect their collective interests, the more affluent members

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[51] H.R. 17974, 90th Cong., 2d Sess. (1968) ; *see* note 24 *supra.*

of our society do not need formal notice of proposed rules and an official opportunity to present their views to the appropriate authorities. After all, most official policy makers are middle-class persons who have had middle-class experiences and daily associations. Consequently, those who are responsible for making administrative regulations are oriented toward the middle-class point of view and are generally conversant with the collective interests of that group. They are, therefore, likely to understand and protect the collective interests of the more affluent, even where such persons do not have a chance to represent their interests formally in rulemaking proceedings vitally affecting them. In order to equalize the poor's position in rulemaking with that of better financed segments of society, the poor may need special guarantees to assure full consideration of their views.

Modification of the section 4(a) exemptions along the lines suggested above would assure that the poor and their representatives, including the people's counsel, would have a reliable means by which to discover and participate in proposed rulemaking of concern to them; they could simply watch the Federal Register. Such a change could probably be effected either by statute or by an executive order, since the President has the authority to command his subordinates to do that which they now have the discretion to do. Since a purely procedural requirement of this type would not seem to interfere with the substantive policy-making functions of the independent federal agencies, they may also be bound by such an order.

However, there is a substantial evidence that section 4(a) needs a general legislative overhaul. Alteration or repeal of that provision has been proposed apart from any more specific consideration of its effect on the ability of poor people to represent their interests adequately in the rulemaking process.[52] Testimony adduced in the course of congressional hearings suggests the possible desirability of across-the-board revisions of the section 4(a) exemptions.[53] Consequently, it may be wise to leave the provision as it is pending further inquiry into the advisability of amending it generally. Instead of narrowly altering the provision at this time in order to solve the particular problem under consideration, federal agencies should simply be urged, in strong terms, to follow the provisions of subsections (b)–(e) for all rulemaking substantially affecting the poor.

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[52] *See, e.g.*, S. 163, 88th Cong., 2d Sess. § 4 (1964) (Comm. Revision); S. 518, 90th Cong., 1st Sess. § 4 (1967).

[53] *Hearings on S. 1663 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); *Hearings on S. 518 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

C. Special Notice and Hearing for the People's Counsel

For the present purposes, another proposal can be made which would partly obviate the need to amend the current exemptions contained in section 4(a). All federal agencies contemplating the promulgation of rules substantially affecting the poor should be *required* to notify the people's counsel of the pendency of such rules and to give this advocate for the underprivileged an opportunity to present the views of the poor. Imposition of this type of duty on a federal agency is not unprecedented. For example, Budget Bureau Circular A–85, discussed previously,[54] directs federal agencies to follow specific procedures with respect to the development of rules and policies for federal assistance programs that include among their eligible recipients state or local governments or quasi-public agencies. Unless special circumstances preclude it, issuing agencies are required to provide the Advisory Commission on Intergovernmental Relations (ACIR) with a copy of all proposed regulations—usually not less than forty-five days prior to their intended promulgation. The ACIR is then under a duty to transmit that information to various state and local government associations which have, normally, three weeks in which to comment to the agencies on the proposed regulations or policies. Another similar obligation to provide special notice and opportunity to appear is imposed by statute on the Interstate Commerce Commission:

> Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the [Interstate Commerce] Commission shall cause the Secretary [of Agriculture] to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.[55]

A similar requirement should now be adopted for all federal agencies with reference to their proposed promulgation of rules substantially affecting the economically underprivileged. If such a procedure were made mandatory, the present exceptions contained in section 4(a) would not seriously prejudice the ability of the poor to have their views represented in the formulation of rules substantially affecting them. When it received notice of such contemplated rulemaking, the people's counsel would disseminate that information to all interested poor people's organizations. After obtaining feedback from them, the people's advocate would affirmatively represent the views of the economically underprivileged to the relevant agency. The effective and economical operation of the people's counsel therefore makes it desirable to impose the following requirements on federal agencies: they must notify the poor's "official" group counsel of all proposed rulemaking substantially affecting poor persons and give it an opportunity to communicate to appropriate officials the views of the economically underprivileged with respect to those proposed rules.

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[54] *See* page 91 *supra*.

[55] 7 U.S.C. § 1291(a) (1964).

It is true, of course, that this limited requirement would not be as satisfactory a cure for the problem as an outright modification of section 4(a) in all cases where poor people's interests are concerned. A substitute provision of the kind suggested above would not assure notice of proposed rulemaking to anyone but the people's counsel and those informed by the people's counsel; and in such circumstances no one but the people's counsel would have a right to present formally the views of the poor with respect to those rules. However, pending general revision of section 4(a), this seems a desirable requirement and a minimally satisfactory substitute guarantee for present purposes.

To ensure that the administrative process is not unreasonably burdened in some situations, an exception similar to that found in APA section 4(b)(B) should be engrafted onto the narrow requirement discussed above. Federal agencies should be allowed to promulgate rules substantially affecting the poor without giving prior notice and an opportunity to be heard to the people's counsel "where the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and . . . [an opportunity for the people's counsel to present its views prior to promulgation of the rules] are impracticable, unnecessary or contrary to the public interest." In cases of this sort, agencies should be required to notify the people's counsel, as soon as practicable, of any consummated rulemaking substantially affecting the poor. Moreover, they should also be required to provide it an opportunity to present the views of the poor with respect to the desirability of amending or rescinding any such rules. This requirement will at least facilitate a reconsideration of accomplished rulemaking in light of the views of the poor where presentation of their position is impractical prior to rulemaking.

The specific requirements suggested here with respect to giving the people's counsel notice and an opportunity to be heard could be imposed by statute or executive order. The latter method might be as efficacious as the former in binding independent regulatory agencies, since the order would deal only with a matter of procedure and would not attempt to invade their substantive policymaking functions. The ease with which such an order could impose or remove these requirements, or modify them as the need dictates, may also make it a more desirable tool for this purpose than a statute.

VI. CONCLUSION

Any attempt to cure the poor's lack of representation in federal rulemaking substantially affecting their interests requires a number of remedies rather than a single one. Congress should institute procedures to facilitate and encourage greater self-initiated efforts by relevant administrative agencies to ascertain the views of the poor. Some body must also perform the functions of a clearinghouse coordinator in order to facilitate greater affirmative participation by the poor and their organizational representatives in rulemaking. To ensure consistent, affirmative representation of high quality for the collective interests of the poor, Congress should create a people's counsel with the responsibilities described above. To perform its function properly, the people's counsel must receive notice of contemplated rulemaking affecting the poor, and must have an opportunity to present poor people's views on the proposed rules to the relevant agencies.

All of these measures in combination should—if properly executed in light of their purposes—provide an adequate remedy for the problem at hand. These recommendations are desirable because they will improve the administration of government. They will assure that the administrative decision makers in the federal establishment are better informed about the interests of the poor than at present. These proposals should also eliminate one source of unnecessary tension between the poor and the federal establishment. They will provide procedures whereby the poor can get a fair hearing on the formulation of significant public policies affecting them. The specific proposals made here will not create any substantial negative impact on the rulemaking process. They will make important affirmative contributions to that process. Since the lack of representation for the poor in federal rulemaking is a critical problem, these proposals should be implemented as swiftly as possible.

RECOMMENDATION NO. 6

DELEGATION OF FINAL DECISIONAL AUTHORITY SUBJECT TO DISCRETIONARY REVIEW BY THE AGENCY

RECOMMENDATION

1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

2. Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:

(*a*) *Intermediate appellate boards*

(1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:

(a) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,

(b) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

(c) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(d) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review by the agency within such time and in

such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such applications for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has been afforded no opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for reconsideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(*b*) *Discretionary review of decisions of presiding officers*

(1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

> (a) A prejudicial procedural error was committed in the conduct of the proceeding, or
>
> (b) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or

because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

REPORT OF THE COMMITTEE ON AGENCY ORGANIZATION AND PROCEDURE IN SUPPORT OF INTERMEDIATE APPELLATE BOARDS: SUBPARAGRAPH 1(a) OF RECOMMENDATION NO. 6

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Recent criticism of the federal administrative agencies has called attention to two fundamental problems that threaten and often compromise the effectiveness of the administrative process: delay in the disposition of contested proceedings and failure to achieve coherent policy formulation. There are differences of opinion as to the causes of these problems and differences in estimate about what measures would be most likely to solve them. But there is widespread agreement that the problems exist.

The late James M. Landis, in his *Report on Regulatory Agencies to the President-Elect*, submitted to John F. Kennedy in December, 1960, put the first problem directly: "Inordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies."[1] The statistics he reported from the larger regulatory agencies demonstrated that long periods of time were required by most to bring formal proceedings to a conclusion.[2] Several agencies required as long as three years to dispose of a proceeding. Other agencies had such large backlogs of pending cases that their present staffs could not hope to clear them up in less than a decade, even assuming that no new cases were docketed in the interim. The available statistics, Dean Landis concluded, "all corroborate the fact of interminable delay."[3] There is some evidence that delay in the administrative process, at least in some agencies, has become worse since Dean Landis wrote.[4]

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[1] J. M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5 (submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary), 86th Cong., 2d Sess. (Comm. Print 1960) [hereinafter cited as LANDIS REPORT].

[2] LANDIS REPORT 5–6.

[3] LANDIS REPORT 6. On the problem of delay, *see also* Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968) Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. PA. L. REV. 145 (1966) ; Gellhorn, *Ad-*

Related to the problem of delay is the fact that the cost of pursuing administrative remedies has become steeper. Delay often means increased costs in litigating a protracted proceeding at the administrative level and increased indirect costs while awaiting the ultimate administrative determination. The rise in costs has been particularly acute in cases involving petitions for important certificates or licenses from regulatory agencies. "The result," as Dean Landis said, "is that in many situations the small businessman is practically excluded from an opportunity to compete."[5]

The second problem—the failure of the federal administrative agencies to achieve the formulation of coherent policy—has been given its fullest statement by Judge Friendly.[6] The problem, in his words, "is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood."[7] Although most statutes command the agencies they create to develop broad policies in the areas subject to their jurisdiction, such policy formulation as has resulted has widely been regarded as inadequate.[8] Newton Minow, writing to the President upon completion of his service as Chairman of the Federal Communications Commission, noted that although "[p]olicy making is *the* critical responsibility of the agency . . . it is precisely in this area that the agencies have been markedly deficient."[9] Dean Landis came to similarly criti-

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ministrative Procedure Reform: Hardy Perennial, 48 A.B.A.J. 243 (1962); Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963).

[4] *See* STAFF OF THE SENATE COMM. ON THE JUDICIARY, 89th CONG., 2D SESS., EVALUATION CHARTS ON DELAY IN ADMINISTRATIVE PROCEEDINGS (Comm. Print 1966); Statement of Frank W. McCulloch, Chairman of the National Labor Relations Board, in *Hearings on Review of the National Labor Relations Act Before the Special Subcommittee on Labor of the House Comm. on Education and Labor*, 89th Cong., 2d Sess. 31, 32–34 (1966). *Cf.* Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir.), *complaint dismissed on remand*, Trade Cas. ¶ 17,484, at 22,759 (1966).

[5] LANDIS REPORT 10. He goes on to note that many companies, able to pass such costs on to consumers in the form of rate increases, lack any real incentive to press for administrative reform. *Id.*

[6] H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

[7] *Id.* at 5–6.

[8] *See* N. MINOW, EQUAL TIME: THE PRIVATE BROADCASTERS AND THE PUBLIC INTEREST 277–304 (1964); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Long, *Proposed Changes in Administrative Law*, 19 SW. L.J. 203 (1965); Long, *The Proposed New Administrative Procedure Act*, 55 GEO. L.J. 761 (1967); Loevinger, Book Review, 68, COLUM. L. REV. 371, 374–79 (1968).

[9] *Suggestions for Improvement of the Administrative Process: Letter to President Kennedy from Newton N. Minow, Chairman, Federal Communications Commission*, 15 AD. L. REV. 146, 147 (1963) (emphasis in original) [hereinafter cited as *Minow Letter*]. For comments in the specific context of the FCC, see Farragut Television Corp., 8 F.C.C. 2d 279, 285–86 (1967) (statement of Commissioner Johnson); Schwartz, *Comparative Television and the Chancellor's*

cal conclusions.[10]

The causes of these problems are complex and varied, differing from agency to agency. Typically, however, delay in the disposition of adjudicatory proceeding is related at least to the growing, insistent press of business before regulatory agencies, lack of adequate agency budgets and staff,[11] and the substantive and procedural complexity of proceedings—especially comparative hearings—involving multiple parties and issues. Lack of adequate policy formulation is typically related at least to "the inability of the members of multimember commissions to reconcile differences among themselves and the press of adjudicatory business demanding fairly prompt solution." [12] When there are frequent changes in an agency's membership, this problem is aggravated.[13] Dean Landis described two additional factors stemming from the burdensome demands made upon members of most administrative agencies: the fact that "in adjudicatory matters, the drafting of opinions is delegated [by the members of the agency] to opinion writing sections or assistants so that the rationalization upon which a purportedly informed decision rests is not truly their own"; [14] and the fact that "briefs of counsel, findings of hearing examiners, relevant portions of the basic records, are rarely read by the individuals theoretically responsible for the ultimate decision." [15] One result, as Chairman Minow stated, "is to *not* formulate the policy—and to postpone the policy decision to resolution on a case-by-case basis which all too often means inconsistent decisions with the public and the regulated industry not knowing the ground rules. More important, its consequence is that vital planning and policy measures are not undertaken." [16]

It would be simplisitic to suggest any single proposal as a certain corrective for problems that have often seemed intract-

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Foot, 47 GEO. L.J. 655 (1959) ; Jaffe, *The Scandal in TV Licensing*, HARPERS MAGAZINE, Sept. 1957, at 77.

[10] LANDIS REPORT 22–24.

[11] *See* LANDIS REPORT 6–7.

[12] Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325, 1326 (1968) (footnote omitted).

[13] *See* Welborn, *Presidents, Regulatory Commissioners, and Regulatory Policy*, 15 J. PUB. LAW 3 (1966).

[14] LANDIS REPORT 19–20. *See also* Great Lakes Airlines, Inc. v. CAB, 291 F.2d 354, 370 (9th Cir.), *cert. denied*, 368 U.S. 890 (1961). Hector, *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A.B.A.J. 1260 (1959) ; Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 615–18 (1959).

[15] LANDIS REPORT 20. Some scholars have cited the failure of Congress to assure agencies a mandate to resolve policy issues as another factor related to inadequate policy formulation. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 50 (1965).

[16] *Minow Letter* 147 (emphasis in original). *See also* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 176–79 (1955).

able.[17] But it would be imprudent to ignore procedures that some agencies have found workable and effective in ameliorating these problems. One such procedure is the intermediate appellate Review Board.[18] The Federal Communications Commission and the Interstate Commerce Commission, pursuant to specific statutory authorization, have created Review Boards to hear appeals from decisions of hearing examiners in adjudicatory cases. This article centers upon the experience of the FCC Review Board.[19] The experience suggests that Review Boards have the capacity for assisting administrative agencies in meeting some of the problems outlined above.

THE FCC REVIEW BOARD

Structure

In 1961, Congress amended section 5(d) of the Federal Communications Act to authorize the Federal Communications Commission to create an intermediate appellate Review Board:

> (1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions [with certain listed exceptions] to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in the Administrative Procedure Act), the delegation in any such

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[17] *See, e.g.,* W. CARY, POLITICS AND THE REGULATORY AGENCIES 125–39 (1967); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 11–27, 49–51 (1965); Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation,* 67 HARV. L. REV. 1105 (1954).

[18] The use of such boards was recommended by Dean Landis to President-Elect Kennedy. LANDIS REPORT 85 (Recommendation No. 5).

[19] The ICC Review Board was created pursuant to 75 Stat. 517 (1961), 49 U.S.C. § 17 (1964). Its work is discussed in Note, *Intermediate Appellate Review Boards for Administrative Agencies,* 81 HARV. L. REV. 1325, 1329–30 (1968). *See also* ABA Committee on Agency Adjudication, *Progress and Problems in Agency Adjudications,* 14 AD L. REV. 239, 245–48 (1962); Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making Authority to Hearing Examiners,* 48 MINN. L. REV. 823, 845–48 (1964); Hutchinson, *Improving Commission Organization and Procedure—Some New Developments,* 32 ICC PRAC. J. 134 (1964); Kahn, *Reorganization of the I.C.C.—1961,* 29 ICC PRAC. J. 586 (1962); *Authority Delegated to Finance Review Board by I.C.C.,* 29 ICC PRAC. J. 608 (1962).

Three other agencies, the Civil Aeronautics Board, the Federal Trade Commission, and the Federal Maritime Commission, have the authority, pursuant to Reorganization Plans, to delegate review functions to an employee board. Reorganization Plan No. 3 of 1961, 75 Stat. 837 (1961), 49 U.S.C. § 1324 (1964) [CAB]; Reorganization Plan No. 4 of 1961, 75 Stat. 837 (1961), 15 U.S.C. § 41 (1964) [FTC]; Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U.S.C. § 1111 (1964) [FMC]. None has exercised the authority, although the CAB has created a system of discretionary review procedures. *See* text accompanying notes 94–96 *infra.* For a suggestion of the reasons for the failure of the FTC and FMC to act, see Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners,* 48 MINN. L. REV. 823, 833-34 (1964). *See also* Note, *The Progress of Federal Agency Reorganization Under the Kennedy Administration,* 48 VA. L. REV. 300 (1962).

> case may be made only to an employee board consisting of three or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office.[20]

Prior to this amendment, the Commission had been required by law to review all initial decisions of hearing examiners to which exceptions had been filed, and to hear oral argument upon request. This was obviously a time-consuming responsibility. The amendment granted the Commission discretion to adopt intermediate appellate review procedures if it believed they might help expedite the disposition of adjudicatory cases; these procedures were intended to enable members of the Commission to devote more of their time to policy and planning and to the more significant adjudicatory cases, primarily those involving issues of general communications policy importance.[21] The Commission took advantage of the amendment and in June, 1962, adopted detailed regulations establishing a Review Board.[22] Four senior staff employees were appointed to the Board; in 1964 its membership was increased to five, its present strength.

The Review Board began functioning on August 1, 1962. Under regulations issued by the Commission, it is authorized to act in three general areas. (1) The Review Board hears appeals from initial decisions of hearing examiners in all adjudicatory proceedings (including mixed adjudicative and rule-making proceedings), except for those proceedings involving the renewal or revocation of a station license in broadcast and Common Carrier Radio Services;[23] although section 5(d) would not prevent the Commission from granting the Review Board jurisdiction over such cases, the Commission apparently gave Congress informal assurances at the time the amendment was enacted that review of initial decisions in so-called "death sentence" cases would remain directly in the Commission.[24] (2) The Review Board passes upon interlocutory appeals from rulings of hearing examiners; these include evidentiary rulings and rulings upon petitions for allowance of amendments to applications, petitions for extensions of time, and petitions to reopen the record.[25] (3) The Review Board exercises original jurisdiction over two classes of interlocutory matters: petitions to amend, modify, enlarge, or delete issues upon which the case was designated for hearing by the Commission,[26] and joint requests filed by broadcast applicants for the approval of agreements looking toward the removal of a conflict between their applications.[27]

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[20] 47 U.S.C. § 155(d)(1) (1964).

[21] H.R. Rep. No. 723, 87th Cong., 1st Sess. 1 (1961); S. Rep. No. 576, 87th Cong., 1st Sess. 5 (1961). See Nathanson, *Looking Backward 2000–1963: A Personal View of the Administrative Conference, 1961–62*, 16 Ad. L. Rev. 33 (1963).

[22] 47 C.F.R. §§ 0.361–0.365; 1.101–1.117 (1968).

[23] 47 C.F.R. § 0.365(a) (1968).

[24] The creation of this exception to the Review Board's jurisdiction cannot be justified on principle. The task of review in these cases is not distinguishable from that involved in cases presently entrusted to the Review Board. The "life-or-death" interests concerned would better be served not by removing these cases from the jurisdiction of the Review Board, but rather by providing for their mandatory review by the Commission after Review Board consideration.

Although the Review Board, in reviewing initial decisions of hearing examiners, is "authorized to perform all of the review functions which would otherwise have been performed by the Commission," [28] it does not have responsibility for the formulation of general communications policy. It is required to decide all matters coming before it on the basis of precedent and existing policy.[29] The Commission has reserved to itself the authority, in cases raising novel or important issues of law or policy, to review initial decisions directly.[30]

Any person aggrieved by a decision of the Review Board may file an application for review with the Commission.[31] The Commission's regulations require that an application for review specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.[32]

The Commission may grant the application for review in whole or in part, or may deny the application, without specifying reasons for the action taken.[33] If the Commission denies the application, the decision of the Review Board becomes the decision of the Commission,[34] which, if it is in other respects a final order, may then be made subject to judicial review.[35]

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[25] 47 C.F.R. § 0.365(c) (1968).

[26] *See* Fidelity Radio, Inc., 1 F.C.C. 2d 661 (1965) ; Atlantic Broadcasting Co., 5 F.C.C. 2d 717 (1966).

[27] 47 C.F.R. § 0.365(b) (1968) ; *see* "What the Bible Says," Inc., 12 F.C.C. 2d 610 (1968) ; Bay Broadcasting Co., 10 F.C.C. 2d 331 (1967) ; Tinker, Inc., F.C.C. 2d 372 (1966).

[28] 47 C.F.R. § 0.361(d) (1968).

[29] 47 C.F.R. § 0.361(d) (1968). *See also* FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965, at 2.

[30] 47 C.F.R. § 0.361 (a) and (b) (1968). Two recent cases in which the Commission exercised this authority are Midwest Television, Inc., 13 F.C.C. 2d 478 (1968) (expansion of CATV service into areas served by regular broadcasting), and Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 2d 420 (1968) (propriety of telephone company tariff prohibitions against interconnections of customer-provided devices).

[31] 47 U.S.C. § 155(d)(4) (1964) ; 47 C.F.R. § 1.115(a) (1968).

[32] 47 C.F.R. § 1.115(b)(2) (1968).

Performance

The Commission is plainly impressed with the utility of the Review Board. In a progress report prepared in April, 1965, the Commission appraised the Review Board's performance during the first twenty-nine months of its existence and concluded that it "has well served the purposes for which it was established, and substantial benefits to the Commission and to parties to Commission proceedings have accrued from its operations." [36] This judgment has more recently been affirmed by several members of the Commission.[37]

The Commission believes that two substantial benefits have resulted from the creation of the Review Board: improvement of the hearing process and saving of agency members' time.[38] They are worth considering separately.

> First, establishment of the Board has benefited the hearing processes. The members of the Board have been able to devote greater personal attention to cases, and to dispose of them more expeditiously than would have been possible for the Commission with its many other responsibilities. The Board has handled a large number of difficult matters with great competence, as indicated by the small number of appeals from its decisions and by the small number of decisions reversed, revised, or remanded by the Commission. Applications for review of Board actions have been handled expeditiously, and no difficulty has been experienced by the Commission in maintaining control over matters of policy.[39]

This statement, of course, groups several factors. First, the Review Board has been able to devote far more time and attention to the reviewing function than members of the Commission had been able to do in the past or could do now. Because of the limited definition of their function, members of the Review Board, as the Commission soundly concluded, "can participate much more actively and extensively in discharging their review functions than can members of the Commission." [40] The consequence is that the members of the Review Board are prepared for the oral argument in every case; they have read the pleadings and the briefs and are informed as to the facts and issues involved. Oral argument thus becomes a meaningful dialogue between advocate and decision-maker; in this respect the Board's practice resembles that of a conscientious appellate court. It is understandable that lawyers regard oral argument before the Review Board as more valuable than it is before the Commission.

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[33] 47 U.S.C. § 155(d)(5) (1964); 47 C.F.R. § 1.115(g) (1968).

[34] 47 U.S.C. § 155(d)(3) (1964).

[35] 47 U.S.C. § 155(d)(7) (1964).

[36] FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965, at 5. *See also* Comments of the FCC in *Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 454 (1965).

[37] Comments of Chairman E. William Henry and Commissioners James J. Wadsworth and Kenneth A. Cox, in STAFF OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 89th CONG., 2D SESS., QUESTIONNAIRE SURVEY ON DELAY IN ADMINISTRATIVE PROCEEDINGS 35–40 (Comm. Print 1966).

[38] FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965, at 5–6.

[39] 47 U.S.C. § 155(d)(5) (1964); 47 C.F.R. § 1.115(g) (1968).

Second, the Review Board's decisions [41] have been of high quality. This quality is the result in part of the fact that responsibility for the preparation of every opinion is assigned to an individual member of the Board, under whose name the opinion will appear.[42] Occasionally the Review Board member responsible for the preparation of an opinion will draft it himself; more frequently, he will supervise the preparation of a draft opinion by a member of the Review Board's staff. Drafts are then circulated among the other members of the Review Board. The Commission has observed, "The desirable merger of the opinion-writing and decision-making processes is feasible in this degree because members of the Board, with their responsibilities limited to adjudicatory hearing cases, can devote themselves for appreciable periods to the preparation of individual opinions." [43]

Although the opinion-writing process retains some characteristics of the "institutional decision," [44] the members of the Review Board participate more intensively and effectively in the preparation of the written decision than do the members of most agencies. One result is that decisions of the Review Board typically meet rather than avoid complex issues and support their conclusions with reasoning and relevant authority.[45] Changes of position are not "slipped into an opinion in such a way that only careful readers would ever know what had happened, without articulation of reasons, and with the prior authorities not overruled,"[46] as Judge Friendly complained of a series of FCC opinions. Among lawyers who regularly appear before the Commission, there seems to be general agreement that decisions of the Review Board are more predictable than were decisions of the Commission in similar matters before establishment of the Board. They reach results that are significantly more consistent with precedent and existing policy and that adhere more closely to the record facts.

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[40] FCC, Review Board Progress Report, April 1965, at 5.

[41] The decisions of the Review Board are published in the Federal Communications Commission Reports.

[42] FCC, Review Board Progress Report, April 1965, at 5.

[43] *Id.*

[44] *See* 2 K. Davis, Administrative Law Treatise, ch. 11 (1958).

[45] *See, e.g.*, Northeast Broadcasting, Inc. v. FCC, 400 F.2d 749, 758 (D.C. Cir. 1968) ("The Review Board's Decision was detailed, comprehensive and expansive in its discussion of the evidence and the relative weight it attached thereto, and concise and precise as to its ruling and the reasons therefor.")

These achievements stem in part from the limits on the Review Board's power. The Board lacks the authority to enter new policy areas. This means that it has no occasion to discuss policy problems with industry representatives. The resulting isolation and anonymity is a salutary protection against hints or charges of improper influence. The Board also lacks the authority to give play or weight to its own expertise in assessing, for example, the comparative qualifications of competing applicants for a broadcast license. This means, as one lawyer has said, that the Review Board will almost always hold for the applicant whose case is best supported in the record in light of the factors that prior Commission decisions have made relevant; conversely, the Review Board is quite unlikely to rely upon the extra-record intimations that lawyers are accustomed to see play a dispositive role at the Commission level.

It should be said, however, that decisions of the Review Board reflect some of the defects of their virtues. Review Board decisions sometimes tend to be scholastic in their reliance upon precedent, formalistic in their insistence upon compliance with procedural and evidentiary rules, and colorless in their treatment of policy issues.[47] Given the Review Board's precise mandate and its position in the Commission's decisional structure, it would be surprising if such tendencies did not appear.

One measure of the Commission's high regard for the quality of Review Board decisions may be seen in its reviewing practices. The Commission has not often granted petitions to review decisions of the Review Board and has even less frequently reversed or remanded Review Board decisions.

During the period from August 1, 1962, to December 31, 1967, the Review Board decided 175 appeals from initial decisions. Petitions for review were filed with the Commission in 86 cases. The Commission agreed to review only 13 percent of the Review

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[46] H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 63 (1962).

[47] *Cf.* Fitzgerald, *Trends in Federal Administrative Procedure,* 19 Sw. L.J. 239, 264 (1965); Atlantic Broadcasting Co., 5 F.C.C. 2d 717, 718 (1966).

Board's decisions: it granted 23 petitions, denied 61, and did not pass on 2 that were withdrawn. Broken down by year, the figures more graphically indicate how infrequently the Commission has agreed to hear appeals from Review Board decisions. During fiscal 1963, the Commission granted no petitions for review; during fiscal 1964, it granted 2 petitions; during fiscal 1965, it granted 6 petitions; during fiscal 1966, it granted 9 petitions; during fiscal 1967, it granted 4 petitions; and during the first half of fiscal 1968, it granted 2 petitions. Of the 23 cases that the Commission agreed to hear during this period, the decision of the Review Board was affirmed in 9 cases, reversed in 9 cases, and remanded in 4 cases; one case had not been decided by the end of the period.[48]

The Commission's use of the power of review has thus been sparing, particularly since review is to be expected in a certain number of cases that are of general communications importance, raise new issues of policy, or make a persuasive claim for changing an existing statement of policy.[49] Sparing use by the Commission of the power of review is crucial to the Review Board's prestige and effectiveness. The capacity of a Review Board to reduce the average length of time that an agency requires to dispose of proceedings depends in part, as the next few paragraphs suggest, upon how frequently the members of the agency elect to review decisions of the Review Board. And this depends in largest part—the argument has come full circle—upon the quality of Review Board decisions.

In the Commission's language, the Review Board has been able "to dispose of [cases] more expeditiously, than would have been possible for the Commission with its many other responsibilities." [50] Statistical tables supplied by the Commission appear to support this contention.[51] During fiscal 1961, before the Review Board had been created, the Commission required an average time of 262 days from the date on which the initial decision was issued to dispose of an appeal from an initial decision of a hearing examiner. By comparison, the Review Board, during the first 29 months of its existence, required an average time of 172 days to dispose of the same appeal—an average saving of almost three months per proceeding. The statistics with respect to interlocutory actions are of similar proportions. During fiscal 1961, the Commission required an average time of 66 days to dispose of an interlocutory matter. The Review Board, during its first 29 months, required an average time of 36 days, thus saving about one month per case.

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[48] These statistics and the ones that follow are based upon information supplied by Donald J. Berkemeyer, Chairman of the Review Board. Statistics may also be found in FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965.

[49] Some such cases, of course, will be reviewed directly by the Commission. *See* note 30 *supra* and accompanying text.

[50] FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965, at 5.

[51] *Id.*, Tables No. 1, 2, and 3. The figures that follow are rounded to the nearest day.

The statistics with respect to the Review Board's experience for the years subsequent to 1964 are of a similar order. During fiscal 1965, the average length of time required to dispose of an appeal from an initial decision was 228 days; during fiscal 1966, it was 267 days; during fiscal 1967, it was 244 days; and during fiscal 1968, it was 210 days. The statistics for these years with respect to the disposition of interlocutory matters indicate average time periods of 40 days per case during fiscal 1965; 43 days during fiscal 1966; 38 days during fiscal 1967; and 43 days during the first half of fiscal 1968.

As these statistics reveal, the average time the Review Board has required to dispose of matters before it has fluctuated in recent years. These fluctuations have coincided with an enlargement of the jurisdiction of the Review Board and a want of sufficient staff assistance.

It is important to note that the statistics do not take account of the time consumed when a party petitions the Commission to review the decision of the Review Board. If such a petition is filed,[52] the saving in days is reduced by the time required by the Commission to act on the application. If the Commission denies the petition, time may be saved over the average pre-Review Board experience, not least because the Federal Communications Act allows the Commission to deny such petitions "without specifying any reasons therefor." [53] However, if the Commission grants the petition and reviews the decision of the Review Board on the merits, the total amount of time required for action by the Review Board and the Commission will almost certainly be greater than the time that would have been required if the initial decision had been reviewed directly by the Commission.[54]

In 1966, Chariman E. William Henry said that the Review Board "has been able to decide such cases [of adjudication] more expeditiously than was previously the case when a Commission decision was required." [55] Although the Review Board in recent years has found itself taking increasing amounts of time to decide matters before it, such figures cannot of course fairly be compared with the Commission's 1961 statistics. No one can know how long today's Commission, with new responsibilities in the areas of CATV and satellite communications, would require, in the absence of a Review Board, to decide adjudicatory appeals.

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[52] It must be filed within 30 days of the decision. 47 C.F.R. § 1.115(d) (1968).

[53] 47 U.S.C. § 155(d)(5) (1964).

[54] FCC, Review Board Progress Report, April 1965, Table No. 3, n.1. More thorough consideration of the issues, however, may be a countervailing benefit.

[55] Comments of Chairman E. William Henry, in Staff of the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Questionnaire Survey on Delay in Administrative Proceedings 35, 36 (Comm. Print 1966).

In addition to improving the agency's hearing processes, the Commission regards creation of the Review Board as having resulted in a second substantial benefit:

> [By virtue of delegations made to the Board in hearing proceedings, the Commission has been enabled to devote a significantly larger portion of its time and energies to major matters of policy and planning and to cases of adjudication involving issues of general communications importance. We cannot stress the importance of this benefit too strongly. There is an ever-increasing number of complex and vital policy matters coming before the Commission because of the changing nature of the communications field (*e.g.*, CATV, space satellite, network television procurement and production). These matters call for close study by the Commission and frequent meetings of Commissioners where there can be the necessary exchange of views and evolvement of policy. The Review Board, by taking over the routine hearing cases, has contributed significantly to the Commission's ability to devote more time and effort to these important policy issues.[56]

Statistics appended to the Commission's progress report give some suggestion of the amount of time that creation of the Review Board has freed for members of the agency to devote to duties other than adjudication. During the 29-month period (March 1, 1960 to July 31, 1962) immediately preceding creation of the Review Board, the Commission devoted a total of 45 days or partial days, representing 130 hours, to hearing oral argument. By comparison, during the 29-month period immediately following creation of the Review Board (August 1, 1962 to December 31, 1964), the Commission devoted only 29 days or partial days, representing 81 hours, to hearing oral argument.[57]

These figures understate the savings in Commission time that resulted from creation of the Review Board. They do not reflect the concomitant savings in time that a reduction in adjudicatory appellate responsibilities produces in preparing for oral argument, deliberating, and drafting final opinions. Furthermore, these figures include cases within the Review Board's jurisdiction that were designated for hearing before the Review Board was established and, under a "grandfather clause," retained on the Commission's docket, as well as television cases, which were not placed within the Review Board's jurisdiction until June 15, 1964.[58]

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[56] FCC, Review Board Progress Report, April 1965, at 6 (footnote omitted).

[57] FCC, Review Board Progress Report, April 1965, Table No. 4.

It has become clear in recent years that what the Commission calls the "second substantial benefit"—freeing agency members from the demands of many adjudicatory appeals—ought to be regarded as the Review Board's most significant contribution.

The experience of the Federal Communications Commission suggests that creation of an intermediate appellate Review Board can bring significant benefits to the regulatory process. A Review Board can apply agency policy with more consistency and more detailed attention to the record than can the agency members themselves. A Review Board can reduce the average time required by the agency to dispose of a proceeding. Most important, a Review Board can free the time of agency members to consider matters of policy and planning by disposing of an absolute number of adjudications that the members of the agency need not decide. These benefits are, as the Commission properly characterized them, substantial.

DEFINITION OF A REVIEW BOARD'S ROLE

Two Models of Review Board

The performance of the FCC Review Board has been shaped by its structure, jurisdiction, and authority. Before deciding to create an intermediate appellate Review Board, an agency must make some preliminary judgments about the function the Board is to perform. Unless judgments about form and function are thoughtfully reached, the establishment of a Review Board may only add another stage of administrative proceedings, achieving no countervailing gain. The agency's goal must be to identify and describe a differentiated function for the Board, and to give it a mandate that will enable it to perform that function well.

This section of the study will explore some of the considerations relevant to the decision to create a Review Board. In undertaking this exploration, it will be useful to make reference to two models of a Review Board—the "judicial model" and the "administrative model." The terms lack precision; they do not correspond to an absolute reality. But they provide a convenient framework for describing two different conceptions of the function that a Review Board might serve. The models do not of course exhaust the possible conceptions of a Review Board; nor should they be regarded as describing even polar conceptions, for they do not.

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[58] 2 FCC, REVIEW BOARD PROGRESS REPORT, APRIL 1965, Table No. 4, n.1.

The models are intended only to suggest that value judgments concerning the appropriate functions of a Review Board are closely related to the details of the Board's structure, jurisdiction, and authority.

The judicial model conceives the function of a Review Board as primarily deciding appeals from initial decisions of hearing examiners in adjudicative cases as nearly as possible on the basis of precedent and formal statements of agency policy. The Board is expected to apply existing law rather than to make new policy, although of necessity it "may consider the extension of present policies to include new factual situations." [59] When policy issues of first impression arise, the Board is expected to certify them to the members of the agency for decision. The judicial model posits the Board's function in deciding questions of law as analogous to that of a lower court subject to review by an appellate tribunal.

The administrative model conceives the function of a Review Board as blending at least some of the roles—deciding appeals in adjudicative cases as well as formulating policy—that members of the agency perform. The Board is expected to speak the agency's mind, not merely to rephrase prior statements; to decide issues as it believes the agency would decide them, whether or not precedent reaches that far. The Board is expected to contribute through its work to the formulation, rather than the mere application, of agency policy. Because its job is to serve almost as an alter ego of the agency, a Review Board based on the administrative model would have a wider jurisdiction and greater substantive authority than one based on the judicial model.

Jurisdiction

In creating a Review Board, one of the most important concerns that an agency must confront is the appropriate definition of the Review Board's jurisdiction. The Federal Communications Act authorized the Commission to create a Review Board to perform "any of its functions . . . including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter." [60] The Commission elected to create a Review Board based upon the judicial model. It granted the Review Board authority to act in three general areas: review of initial decisions of hearing examiners in all adjudicative matters, including mixed adjudicative and rulemaking proceedings; interlocutory appeals from rulings of hearing examiners; and original jurisdiction in two important areas of interlocutory matters. The decisions that the Federal Communications Commission made in defining the jurisdiction of its Review Board may usefully be examined.

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[59] Charles County Broadcasting Co., 25 P & F Radio Reg. 903, 907 (1963).

[60] 47 U.S.C § 155(d)(1) (1964).

In amending the Federal Communications Act to authorize the creation of a Review Board, Congress did not attempt to describe the jurisdiction of the Review Board. Instead, it gave the Commission complete freedom to determine which of its functions should be delegated to the Review Board. This freedom has allowed the Commission to adjust the Review Board's jurisdiction in light of the Board's performance and of changing exigencies within the Commission. Thus, in 1964 the Commission enlarged the Review Board's authority to review additional categories of initial decisions.[61] It was the Commission's freedom to make these changes on its own motion that made them possible at all. Had Congress defined the Review Board's jurisdiction, redefinition would have required an amendment to the statute; it is plain that the legislative process could not fashion such redefinitions with either the sensitivity or the celerity of an agency.

If a Review Board is to make a significant contribution toward expediting agency decisions and freeing agency members' time, the agency must be prepared to grant it a subject matter jurisdiction that accounts for a large number of cases and to allow most of its decisions to become final. The success of the FCC Review Board, as the discussion above indicates,[62] supports this principle.

Equally crucial to the success of a Review Board will be the capacity of the members of the agency to identify the classes of cases appropriate for intermediate appellate review procedures. If the members of the agency fail in this task, creation of a Review Board will only add to delay. What principles are relevant to making this determination? One commentator has written:

> [M]any of the very complex cases such as route cases in the CAB or large merger cases before the ICC depend on the relevance and interrelation of a very large number of "economic facts" such as the effect of the merger or new route, or the validity of a complicated cost study.
>
> . . . The agency, in evaluating the appropriateness of a new route, for example, is really performing the managerial function of resource allocation; the ultimate decision involves a judgment concerning the relationship among an open-ended series of variables, and the final determination in the particular case cannot be deduced from a generally applicable rule. Policy formulation in the legislative sense is not possible;

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[61] 47 C.F.R § 0.365 (1968).

[62] See text accompanying notes 48–55 *supra*.

> a system of intermediate appellate review cannot reduce delay in the disposition of cases without compelling the agency to formulate artificial guidelines for the allocation of industry resources.[63]

The jurisdiction that the Federal Communications Commission gave to its Review Board is appropriate for a Review Board based on the judicial model because it is limited to cases involving policy application rather than policy formulation. An agency whose docket includes a high percentage of cases involving policy formulation might benefit only from a Review Board based upon the administrative model; such a Review Board would require jurisdiction over quasi-legislative or rulemaking proceedings.

Review of the Review Board

The amendment to the Federal Communications Act that authorized creation of a Review Board also provides for review of its decisions. Any person aggrieved may apply to the Commission for review; the Commission may also review Board decisions on its own motion. Absent such review, a decision or order of the Board becomes that of the Commission. Application for review is a condition precedent to judicial review of the Commission's action.[64]

The most notable aspect of these provisions is the freedom and responsibility left the Commission to design a system to review decisions of the Review Board. By providing that a decision of the Review Board shall become the decision of the Commission absent such review, the statute grants the Commission the freedom to make final any Review Board decisions it chooses. By providing that review of Review Board decisions shall be "in such manner as the Commission shall prescribe," the statute grants the Commission the responsibility of selecting wise principles of review.[65]

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[63] Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325, 1331 (1968) (footnote omitted).

[64] 47 U.S.C. § 155(d) provides in part:

> (3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.
>
> (4) Any person aggrieved by any such order, desion, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.
>
> (5) In passing upon applications for review, the Commission may grant in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.
>
> (6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.
>
> (7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection.

An examination of the principles selected by the Commission is instructive. Under the Commission's regulations, any person aggrieved by a decision of the Review Board may file an application requesting review by the Commission:

> (b) (2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:
>
> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.
>
> (c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.[66]

A note to the Commission's regulations advises persons seeking review by the Commission that "the application for review should be prepared with the understanding that its purpose is not to obtain a Commission decision on the merits of the issues but rather to convince the Commission to review those issues." [67]

The regulations make plain that the Commission has the authority on its own motion to order the record of a proceeding before it for review; [68] it is not dependent upon the motion of a person aggrieved. Once an application for review has been filed with the Commission, it "may grant the application for review in whole or in part, or may deny the application, without specifying reasons for the action taken." [69] If the Commission grants the application for review, "it may order such further procedure, including briefs and oral argument, as it may deem useful" [70] and may affirm, reverse, modify, or set aside the Review Board's action or may remand the proceeding for reconsideration.[71]

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[65] Lawyers who regularly practice before an agency may be concerned that creation of a Review Board will reduce their access to members of the agency. So long as a petition for review may be filed with the members of the agency, the substance of this concern is that creation of a Review Board will reduce a lawyer's opportunity to argue important issues of administrative policy to the presidential appointees who are finally responsible for the formulation of agency policy. This concern can be greatly tempered, however, by wise agency action in granting and denying review of decisions below. Indeed, agencies are likely to be as sensitive as their practitioners to the existence of policy issues that require responsible consideration at the very top; members of agencies are not likely, by design or inadvertence, to forfeit their authority to decide these issues. An agency can also temper this concern by following the procedure that the FCC followed in establishing its Review Board of soliciting comments on its proposed regulations before making them final. See Fitzgerald, *Trends in Federal Administrative Procedure*, 19 Sw. L.J. 239 262 (1965).

[66] 47 C.F.R. § 1.115 (1968).

[67] 47 C.F.R. § 1.115 (1968).

[68] 47 C.F.R. § 1.117(a) (1968).

These regulations give the Commission complete control over selection of cases for review. They do not require the Commission to grant an application for review in any case; this means the Commission can realize the time-freeing potential of the Review Board to the extent it chooses. The regulations do not prohibit the Commission from granting an application for review in any case and they allow the Commission to bring up cases for review on its own motion; this means the Commission has authority to place its imprint on the aggregate work product of the Review Board.

Review of decisions of the Review Board is thus totally at the option of the Commission. There is much to be said for this arrangement. First, the Commission cannot be committed by Review Board action to a position that the members of the agency do not share. The Commission's regulations take full account of Professor Davis' view that "the policy judgment should be an easy one that no one but the Presidential appointees can have final responsibility for what is done in the name of an agency. The agency heads should have power to delegate, but they should lack power to delegate in such a way as to deprive themselves of their residual power." [72]

Second, the Commission cannot be bound by findings of fact with which it disagrees, even if the hearing examiner and the Review Board have concurred in finding them. The Commission retains, in the language of the Administrative Procedure Act, "all the powers which it would have in making the initial decision." [73] Retention by the Commission of plenary power to resolve issues of material fact is preferable to any limitation by such formulations as "unless clearly erroneous" or "unless contrary to the weight of the evidence." Chairman McCulloch of the National Labor Relations Board has pointed out that "in many cases questions of law, policy, and fact are intermingled."[74] Wise resolution of questions of law and policy may be thwarted if an agency lacks the authority to disagree with the Review Board's evaluation of intermingled questions of fact.

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[69] 47 C.F.R. § 1.115(g) (1968).

[70] 47 C.F.R. § 1.115(h) (1968).

[71] 47 C.F.R. § 1.115(i) (1968).

[72] Statement of Kenneth C. Davis, in *Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 256 (1964).

[73] Administrative Procedure Act § 8, 80 Stat. 387, 5 U.S.C. § 557(b) (Supp. III, 1968).

Third, the Commission cannot be precluded from reviewing a case merely because the grounds upon which review is sought do not meet the suggested criteria for granting an application for review. The Commission might, for example, choose to review a proceeding because the proposed agency action involves severe consequences for a party. There is a symbolic value in such review—attention by presidential appointees to individual instances of special hardship—which makes its retention important. A system that limited review by agency members to specified grounds or specified issues could deny recognition to this value.

PROBLEMS IN ESTABLISHING A REVIEW BOARD

Appointment

A Review Board will be valuable only if an agency is prepared to make first-rate appointments to the Board. There can be no compromise with this principle if the Review Board is to win respect or acceptance from hearing examiners, the agency's staff, and the practicing bar. If the Review Board fails to win both respect and acceptance, pressures to abolish it will gather.

The success of the FCC Review Board rests in part on the fact that the original appointees (all of whom still serve) are persons of undoubted ability and extensive experience. All five had achieved high position within the agency before being named to the Review Board.[75] They brought varied experience to their joint work; they were, in the statutory language, "qualified by reason of their training, experience, and competence, to perform such review functions."[76]

The FCC's decision to name senior staff employees to the Review Board undoubtedly thinned the ranks at a very important level. But the price had to be paid; it gave an earnest of the agency's commitment to making the Review Board work. Adherence to this commitment will not exact as great a price in the future; once the members of the original Board have been named, vacancies can be expected to occur one at a time.

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[74] Statement of Frank W. McCulloch, Chairman of the National Labor Relations Board, in *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 223 (1967).

[75] Two had served as Chief of the Office of Opinions and Review, one had been Chief of the Renewal and Transfer Division of the Broadcast Bureau, one had been Assistant General Counsel in charge of the Regulatory Division, and one had been an Engineering Assistant to a Commissioner.

[76] 47 U.S.C. § 155(d)(8) (1964).

Four further comments about the selection of Review Board members may be worth making. First, an agency may think it desirable on occasion to select a hearing examiner to serve on its Review Board. Some of the arguments supporting the occasional selection of a hearing examiner are similar to those supporting the occasional selection of a trial judge to serve on an appellate court. Persons experienced in the discipline of finding facts bring a useful and particularized expertise to the review function. The possibility of promotion is valuable both in attracting able men to the corps of hearing examiners and in sustaining their morale after they undertake service. And finally, hearing examiners will more tolerantly accept reversals of their decisions when at least one of the Review Board members has first-hand knowledge of the conditions under which examiners work.

Second, the members of an agency may think it desirable on occasion to select a non-lawyer, such as an engineer or a rate expert, to serve on its Review Board. The selection of a non-lawyer may be particularly appropriate when sophisticated technical expertise is necessary for resolution of cases within the Review Board's jurisdiction. Although technical experts could be assigned to the Review Board's staff, an agency might well conclude that Board members are more likely to listen to a technical expert if he is a colleague and peer rather than a staff subordinate. The decision of the FCC Review Board, composed of four lawyers and an engineer, to sit in ten randomly-selected panels of three means that some panels consist of three lawyers while others consist of two lawyers and an engineer. Lawyers who regularly practice before the FCC do not seem to regard the difference as significant. This suggests that there should not be an *a priori* bar to the selection of a non-lawyer to serve on a Review Board even if it is constructed on the judicial model.

Third, an agency ought not regard itself as limited to selecting only senior staff employees to serve on its Review Board. The test of selection must be suitability to perform the Review Board's functions. Some senior staff employees ably suited for their present responsibilities may not have the particular qualities that service on the Review Board will require; more junior employees may possess these qualities. Conversely, an agency may think it desirable to have a Commissioner serve on the Review Board, particularly if its functions approximate those of the administrative model. It should be noted, however, that the presence of a Commissioner—whose party affiliation would be a matter of public record—would prevent the Review Board on which he served from having the bipartisan character that Congress has typically required for actions by presidential appointees;[77] in addition, the presence of a Commissioner might inhibit his Review Board colleagues from disagreeing with him and deter his colleagues on the agency from reversing Review Board decisions in which he participated.

Fourth, an agency's commitment to the theory of a Review Board will be tested when a vacancy occurs, perhaps several years after the Board has been created, perhaps when several new members sit on the agency. It is imperative that an agency, in filling the vacancy, not succumb to the false assumption that the Review Board has become an institution able to perform its function and retain its authority without regard to the quality of the appointment made. An agency that uses Review Board vacancies to solve problems presented by staff employees who have not worked out well in their present positions will substantially weaken the Review Board.

Status and Tenure

The GS status of Review Board members is directly related to the quality of persons who will accept service on the Review Board and to the Review Board's ability to command respect within the agency and without. Unless staff members and the practicing bar regard appointment to the Review Board as a promotion to a very senior position in the Civil Service hierarchy, the prestige and authority of the Review Board will suffer.

The Federal Communications Act requires that Review Board members "be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed."[78] Hearing examiners at the FCC, as in most other places in the federal government, hold GS–16 positions. All five members of the Review Board hold GS–17 grade classifications. Although the statutory requirement is met as long as members of the Review Board hold GS–16 grade classifications, the elevation in grade classification is obviously desirable.

By comparison, the Interstate Commerce Act does not place grade classification requirements on appointments to ICC Review

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[77] *See, e.g.*, Federal Communications Act § 154(b), 47 U.S.C. § 154(b) (1964); Federal Trade Commission Act § 1, 15 U.S.C. § 41 (1964).

[78] 47 U.S.C. § 155(d) (8) (1964).

Boards. None of the fifteen members of the agency's five Review Boards holds a GS–17 position, and only four chairmen hold GS–16 positions; the fifth chairman and the remaining ten members hold GS–15 positions. It is not surprising that the ICC has great difficulty in persuading GS–16 hearing examiners to take GS–15 or GS–16 Review Board positions, particularly in view of the greater tenure protections that examiners enjoy under the Administrative Procedure Act.[79] This problem is more easily described than remedied, since most agencies will have only a limited number of super-grades (GS–16 through –18) available.

Related to the question of status is that of tenure. In creating a Review Board, an agency will have to decide on the term of office of its members. Several alternatives are possible.

An agency might believe that Review Board members should hold office indefinitely and be removable only for cause. This arrangement would be similar to that enjoyed by hearing examiners. Such a judgment would be consistent with creation of a Review Board based upon a judicial model. Such an essentially tenured status—assuming that an agency could grant it in the absence of specific statutory authority—would preserve the independence of Review Board members and protect them against the fear (whether real or imagined) of reprisal for decisions they have rendered. It would also, no doubt, be an attractive factor in persuading able staff employees to accept appointment to a Review Board.

The five members of the FCC Review Board have no formal protection against removal, although an FCC regulation provides that they shall "serve indefinitely";[80] they are as vulnerable as other staff employees to being shifted to other positions within the agency. It seems clear, however, that institutional norms and expectations have developed that would exert strong moral pressure against removal of a member of the Review Board for anything less than substantial reasons. This may suggest that Review Board members performing essentially judicial functions can achieve significant de facto protection against removal without good cause, even if formal provision granting such protection is not or cannot be made.

The fact that members of the FCC Review Board have GS–17 status also serves as a deterrent to removal. They could not be shifted to other positions within the agency without being required to accept a lower grade classification; an agency is likely to hesitate before exacting such a sacrifice. Granting a GS-17 status to Review Board members may provide a protection against removal which is similar to that enjoyed by hearing examiners, without severely restricting an agency's power to make changes in Review Board membership in unusual situations.

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[79] Section 11 of the Administrative Procedure Act provides that a hearing examiner "may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing." 80 Stat. 528, 5 U.S.C. § 7521 (Supp. III, 1968).

[80] 47 C.F.R. § 0.361(e) (1968).

An agency, of course, might believe that Review Board members should be removable more readily than a "for good cause" rule would allow. This arrangement would be consistent with the creation of a Review Board designed to approximate the administrative model. It would allow the agency to change the membership of the Review Board to reflect changes in the membership and philosophy of the agency itself. An agency might adopt such an arrangement if it believed that a Review Board could fulfill its purposes best when its members were sympathetic with and responsive to the views of present agency members. However, an agency's authority to bypass the Review Board and directly review hearing examiners' decisions may minimize the necessity of making Review Board members readily removable in order to promptly implement changes in agency policy.

Other arrangements are also possible. Review Board members might, for example, be appointed for a fixed term of years; provision could be made for reappointment. An agency that adopted such an arrangement could achieve certain gains in flexibility and in the renewal of energy that a system of rotation offers. An arrangement that contemplated rotating terms of service might make it easier professionally for a Review Board member to remain at the agency in another position when his term expired.

Insulation From Ex Parte Contacts

The degree to which Review Board members should be insulated from contact with members of the agency or members of the staff will depend largely upon the function that the Review Board is expected to perform. The more nearly the Review Board is based upon the judicial model, the more appropriate it may seem to insulate its members from discussions of cases pending before it.

The FCC Review Board is insulated by several statutory provisions and regulations. Section 409(c)(1) of the Federal Communications Act provides:

> In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for a hearing, no person who has participated in the presentation or preparation for

> presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 155(d)(1) of this title, unless upon notice and opportunity for all parties to participate.[81]

This section represents a congressional judgment that interested persons and agency staff members who have participated in the preparation or presentation of a case should not have any additional and *ex parte* contact with the authority that will decide the case, whether it be the Review Board or the members of the agency. In addition, section 155(d)(8) directs that Review Board members

> shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.[82]

These two statutory provisions are reinforced by an FCC regulation:

> Neither the Commission nor any of its members will discuss the merits of any matters pending before the Board with the Board or any of its members.[83]

In practice, these provisions mean that members of the FCC Review Board do not discuss the merits of specific cases pending before them with anyone in the agency. One reason the Review Board has been given its own staff of lawyers, opinion writers, and technical experts is to make unnecessary any consultation between Review Board members and agency employees who also serve the members of the agency.

The manner in which the insulation of the FCC Review Board has been achieved is consistent with the judicial model. A Review Board based on the administrative model might function differently. An agency creating such a Review Board might think it desirable to permit consultation on some occasions between members of the Review Board and members of the agency and its staff. Although it may be assumed that members of the Review Board would not discuss pending adjudicatory proceedings with members of the agency or with the staff, such consultation would not be inappropriate when a Review Board has been delegated the task of rulemaking.

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[81] 47 U.S.C. § 409(c)(1) (1964).

[82] 47 U.S.C. § 155(d)(8) (1964).

[83] 47 C.F.R. § 0.361(e) (1968).

Because rulemaking proceedings often involve large issues of policy and have relevance to significant areas of the agency's jurisdiction, an agency might properly believe that Review Board members ought not be insulated from staff members whose experience would be helpful in formulating a sound rule. Full access to the agency's staff might also reduce the likelihood that the agency would reject a Review Board decision based on the months of costly proceedings typical of rulemaking. In addition, a decision by an agency to grant the Review Board a significant role in the formulation of rules may bring Review Board members into an advantageous competition with other agency employees, such as bureau chiefs, who otherwise would make the only recommendations to members of the agency on the lines that new policy should follow.

Response of Hearing Examiners

The decision to create a Review Board may cause concern among an agency's hearing examiners. Professor Davis, commenting in 1965 on experience at the FCC, said "Examiners, of course, are opposed to the whole idea of the Review Board, for they prefer the idea of limited review of examiners' initial decisions."[84] The statement is probably less true today than it was in 1965, largely because hearing examiners have learned that the Review Board's success in the predictable application of standards has increased their opportunities to make decisions that will not be appealed or will stand upon appeal.[85]

Nevertheless, the creation of a Review Board means that examiners' decisions will be reviewed in the first instance by employees of the agency rather than by presidential appointees; examiners may regard this as diminishing their stature in the agency's overall decision-making process.[86] Sometimes it may mean, as it does at the ICC, that decisions of GS–16 examiners will be reviewed by GS–15 members of Review Boards. Sometimes it may mean, as it does at the FCC, that examiners' decisions will be reviewed by a Review Board whose membership does not include anyone with experience as a hearing examiner. The members of the Review Board may give the impression that they do not have complete respect for the competence of hearing examiners; one hearing examiner at the FCC reported to a Senate subcommittee that the members of the Review Board "regard the initial decision as a point of departure. To them it is pretty much just another pleading."[87] Under these circumstances hearing examiners may see the creation of a Review Board as a threat to their status and prestige; the result may be a lowering of morale.

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[84] 1 K. Davis, Administrative Law Treatise § 9.05 (Supp. 1965). The Federal Trial Examiners Conference opposed the legislation authorizing the FCC and ICC Review Boards. *Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce on Reorganization of FCC*, 87th Con., 1st Sess. 82–83 (1961).

[85] *Cf.* E. Redford, National Regulatory Commissions: Need for a New Look 12–13 (1959). *But cf.* text accompanying note 87 *infra*.

[86] *See* Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, 48 Minn. L. Rev. 823, 866 (1964).

These are human concerns—perhaps they are inevitable—and to some degree they can be met by sensible administration. They may be accompanied, however, by a deeper concern impossible to accommodate: the concern, plainly justified by the example of the FCC Review Board, that a Review Board is more likely to give intensive scrutiny to the record than members of the agency typically do, and is more likely to notice procedural lapses, insufficiencies of proof, and examiners' errors. This, of course, is one of the functions of a Review Board.

The Desirability of Enabling Legislation

The success of the FCC Review Board raises the question of the desirability of legislation that would extend the concept of intermediate appellate review procedures to other agencies. Proposals calling for such an extension to most of the federal administrative agencies have been made in three recent sessions of Congress.[88] Few agencies have been opposed to permissive legislation that would enable agencies in their discretion to establish a Review Board. Almost every agency has objected, however, to blanket legislation that would compel agencies to establish a Review Board; this has been true even when the proposed legislation has provided some statutory exceptions for circumstances in which use of a Review Board might be unnecessary or inappropriate.[89]

Extensive testimony offered at congressional hearings over a period of years has made clear that legislation compelling all agencies to create Review Boards would be unwise. The basic reason, subject to illustration by many examples, is that such legislation would place the differentiated procedures of agencies with disparate functions "in a straitjacket;"[90] it might not allow an agency the flexibility, for example, of creating a Review Board for certain classes of cases only, or for certain separable parts of cases. Or it might require review procedures of agencies that have no need of them.

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[87] Comments of Thomas A. Donahue, in Staff of the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Questionnaire Survey on Delay in Administrative Proceedings 235 (Comm. Print 1966).

[88] S. 1663, 88th Cong., 1st Sess. (1963); S. 1336, 89th Cong., 1st Sess. (1965); S. 518, 90th Cong., 1st Sess. (1967). S. 1336 passed the Senate but failed in the House. The most recent proposal, S. 518, provided:

> Except to the extent that the establishment of an agency appeal board is clearly unwarranted by the number of proceedings in which exceptions are filed or that agency appellate procedures have been otherwise provided by Congress: (A) Each agency shall establish by rule one or more agency appeal boards composed of agency members, hearing examiners (other than the presiding officer), or both.

S. 518, 90th Cong., 1st Sess. § 8(c)(2) (1967). *See* Byse, *The Judicial Review Provisions of S. 518, The Proposed Administrative Procedure Act of 1967*, 20 Ad. L. Rev. 198 (1968).

[89] Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 Harv. L. Rev. 1325, 1333 (1968).

Some agencies may have manageable workloads that do not disable their members from giving adequate attention to their adjudicatory and policy-making duties. Chairman White of the Federal Power Commission told a Senate subcommittee in 1967, "The Commission does not have many appeal proceedings. Thus, 29 examiners' decisions were rendered in 1966 and exceptions were taken or review instituted on the Commission's own motion in 25 cases. In my judgment, 25 contested gas and electric cases a year do not justify the appeal board procedure, considering the substantial expenditures of money and people that 'an appeal board would require."[91] When the members of an agency are called upon to decide a relatively small volume of adjudicatory cases, creation of a Review Board may be unnecessary either to expedite the disposition of adjudicatory proceedings or to free the time of agency members for policy-making tasks.

Most agencies, of course, have a greater number of appeals than Chairman White describes for the Federal Power Commission. However, they may have devised procedures to make their workloads manageable. The Securities and Exchange Commission, for example, has the power to control the number of cases on its adjudicatory docket; its docket of contested hearings is limited to cases that it elects to initiate. This is a power denied to agencies such as the Federal Communications Commission that must respond to applications and petitions filed by private parties. By carefully limiting the number of cases that it brings, by sometimes chastising informally rather than proceeding to an administrative hearing, by inviting offers of settlement, by entering into consent agreements, the Securities and Exchange Commission is able to exercise a significant measure of control over its workload and thereby increase its regulatory efficiency. However, "the fact that a particular agency may be keeping abreast of its work does not always indicate that it is making the wisest use of the time and skills of its members and staff." [92] It may indicate instead that the agency has artificially limited the size of its docket so that its workload, although manageable, does not include enough cases to allow it to effectuate the regulatory aims of the statute entrusted to its administration.[93] Therefore, the fact that an agency has succeeded in limiting its workload to a manageable size will not always be inconsistent with the possibility that intermediate appellate review procedures are desirable.

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[90] *Id.*

[91] Comments of Chairman Lee C. White, in *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 189 (1967).

Other agencies may seek to make their workloads more manageable by adopting discretionary review procedures at the agency level. The Civil Aeronautics Board adopted such procedures in 1963 pursuant to authority granted by Reorganization Plan No. 3 of 1961; [94] several other agencies possess similar authority but have not exercised it.[95] Discretionary review procedures allow the members of an agency to limit their plenary consideration to cases that raise issues of the greatest importance.[96] An agency should adopt such procedures only if it has sufficient confidence in the work of its hearing examiners to allow a significant percentage of initial decisions to stand unreviewed. An agency which believes that its hearing examiners merit such confidence also might charge them with considerably more power over the conduct of the hearing than they may now possess and might limit time-consuming interlocutory appeals. Because "almost 30 percent of all the hearing examiners in federal service (161 out of 578) may retire from service during the next three years as a result of mandatory or optional retirement," [97] agencies will have a significant opportunity to strengthen the quality of the hearing examiner corps. In these circumstances, an agency that has the authority to adopt discretionary review procedures may conclude that such procedures are at least as likely to free the time of agency members as would an intermediate appellate review system.

Still other agencies whose workloads might seem to suggest the desirability of Review Board procedures may regard the adjudicatory burden as a necessary or useful one to bear in order to secure advantages that might be compromised under a Review Board system. This may be particularly true of agencies concerned with prompt disposition of certain classes of cases. Chairman McCulloch of the National Labor Relations Board expressed concern to a congressional subcommittee in 1967 that mandatory imposition of a Review Board, by adding a level of internal review, "would unduly burden and delay the handling of election cases and nullify the Congressional intention to expedite the processing of such cases." [98]

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[92] Committee on Internal Organization and Procedure, Delegation of Final Decisional Authority, in *Selected Reports of the Administrative Conference of the United States*, S. Doc. No. 24, 88th Cong., 1st Sess. 157, 158-59 (1963).

[93] *See* Phillips Petroleum Co., 24 F.P.C. 537, 546 (1960), *aff'd*, 303 F.2d 380 (D.C. Cir. 1961), *affirmed sub nom.* Wisconsin v. FPC, 373 U.S. 294 (1963).

[94] Reorganization Plan No. 3 of 1961, 75 Stat. 837 (1961), 49 U.S.C. § 1324 (1964); CAB Delegation of Function to Hearing Examiners, 14 C.F.R. § 301.47 (1963).

[95] *See* Reorganization Plan No. 4 of 1961, 75 Stat. 837 (1961), 15 U.S.C. § 41 (1964) [Federal Trade Commission]; Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U.S.C. § 1111 (1964) [Federal Maritime Commission]; *cf.* E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission*, 36 U. CHI. L. REV. 113, 181-83 (1968).

[96] *See* Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, 48 MINN. L. REV. 823, 853-69 (1964).

[97] Miller, *The Vice of Selective Certification in the Appointment of Hearing Examiners*, 20 AD. L. REV. 477, 485 (1968).

A similar conclusion could be reached by agencies whose members believe that constant exposure to actual records and the shifting factual patterns that litigation reveals, although it may be time-consuming and repetitive, serves an educational function. A succession of mine-run cases may hold hints of the emergence of new problems the significance of which the agency's staff may not be as likely to recognize. The members of the agency may therefore regard such exposure as essential to the proper performance of their policy-making duties.

One might argue with many of these agency estimates. Some may understate the need for a Review Board; others may overstate the advantages of present arrangements. Agencies are as prone as other institutions to make the error, in de Tocqueville's precise phrase, of confusing the familiar with the necessary. Even if the estimates are arguable, however, their variety demonstrates that mandatory imposition of Review Board procedures on every agency would be an indiscriminate reform. "[N]o formula of reform can be applied across the board to all agencies," [99] and it would be a serious mistake to enact legislation that seeks to require the creation of Review Boards wholesale, as it were, rather than retail. Legislation that lacks the support and sympathy of agencies, particularly if it seeks to control internal procedures, is not likely to succeed in any event.

This does not mean that it would be inappropriate for Congress to enact enabling legislation authorizing federal administrative agencies to exercise their discretion to create Review Boards. To the contrary, such legislation would place the power of decision where it belongs. By allowing agencies to consider the establishment of Review Boards without the necessity of having to persuade

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[98] Comments of Chairman Frank W. McCulloch, in *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 223 (1967).

[99] Bernstein, Book Review, 81 HARV. L. REV. 1886, 1887 (1968).

Congress to grant the statutory authority to do so—indeed, by mooting the question whether statutory authority is necessary—such legislation might stimulate experimentation with appellate review procedures.

By enacting enabling legislation only, Congress runs the risk that it will not be implemented; the risk will extend to agencies where the desirability of Review Board procedures may seem the most clear. But the risk of inertia or bad judgment by some agencies seems preferable to the serious possibility that unworkable, uncongenial procedures will be fastened on agencies that perhaps do not need or want them. It is wholly proper, if Congress believes it desirable, to require agencies to report from time to time whether they have elected to create a Review Board, and the reasons for their decisions.[100] In any event, the risk of non-implementation is one that Congress can eliminate by enacting individualized legislation for any agency about which it is specifically concerned.

In framing enabling legislation, Congress should take care to preserve wide opportunity for agency choice of structure, jurisdiction, and authority of Review Boards. It would be shortsighted to prescribe detailed procedures and requirements for Review Boards on the assumption that agencies that establish Review Boards will reflect different estimates of different needs in diffent agencies. Enabling legislation will be useful in the degree that it allows individual agencies the latitude to establish Review Boards that can truly be responsive to their distinctive needs,

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[100] *See* Committee on Internal Organization and Procedure, Delegation of Final Decisional Authority, in *Selected Reports of the Administrative Conference of the United States*, S. Doc. No. 24, 88th Cong., 1st Sess. 157, 163 (1963).

REPORT IN SUPPORT OF DISCRETIONARY REVIEW OF DECISIONS OF PRESIDING OFFICERS; SUBPARAGRAPH 1(b) OF RECOMMENDATION NO. 6

Prepared by
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I. ORIGIN OF REVIEW

At the meeting of the Council of the Administrative Conference on November 11, 1968, the Committee on Agency Organization and Procedure proposed that the Conference consider amending Section 8 of the Administrative Procedure Act (5 U.S.C. 557) so as to give the administrative agencies the authority to establish intermediate appellate boards to review formal proceedings. The proposal was supported by a lengthy written report of Professor James O. Freedman of the University of Pennsylvania Law School and the consultant to the Committee. Professor Freedman's paper was basically a study of the appeals board procedure at the Federal Communications Commission. While he noted that such a procedure was used in at least one other agency (the ICC) and while he referred to the type of discretionary review procedure in effect at the CAB, he did not analyze any but the FCC's experience.

The Council considered the recommendation at its November 11, 1968, meeting. The Council adopted the position that the proposal should recommend not only the use of appeal boards, where appropriate, but should give the agencies the alternative of selecting the discretionary review procedure. The latter procedure had been recommended by the 1961–62 Conference, but had not been implemented.

The Council's amendment was accepted by the Committee, and the proposal, as amended, was submitted to the Assembly at the plenary session in December 1968. The issue prompted considerable discussion at the meeting. Finally, the Committee's proposal, as amended, was adopted as a recommendation of the permanent Conference. However, the Committee on Agency Organization and Procedure was requested to make a study of the discretionary review procedure as used at the CAB and to report the results to the Conference.

II. HISTORY AND APPLICATION OF CAB RULE

Reorganization Plan No. 3 of 1961[1] authorized the Civil Aeronautics Board "to delegate [subject to the strictures of the Administrative Procedure Act] any of its functions to a division of the Board, an individual Board member, a hearing examiner, or an employee or employee board . . ." The CAB could have chosen to set up an intermediate appeals board under this authority. It chose instead to adopt a discretionary review procedure similar to the certiorari procedure applicable in the Supreme Court of the United States.

This procedure was first proposed by Notice of Proposed Rulemaking PDR–8, September 12, 1961[2] and was finally adopted with relatively minor amendments by procedural rule issuance PR–59 of January 23, 1962.[3]

Prior to adoption of the rule, the Board reviewed virtually all examiner's initial decision. Exceptions, if any, to the initial decision were required to be filed 10 days after service thereof,[4] and the case would be reviewed as a matter of course.[5] The review in almost all instances involved all issues and all of the evidence which was before the examiner. While the rules provided that no objection could later be made in brief or oral argument with respect to an ultimate conclusion which was not expressly made the subject of an exception, it was a poor attorney indeed who could not couch his exceptions in broad enough terms to permit his full articipation in the matters before the Board.[6]

Except in the most insignificant cases, the Board review would involve the filing of briefs to the Board within a time specified, and an oral argument before the Board.

PR–59 was intended to remedy this situation. Its essential parts were:

(1) a delegation of authority, to the hearing examiner as-

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[1] 5 U.S.C. App.

[2] 26 F.R. 8642

[3] The rule, as originally proposed included a discretionary review procedure for air safety proceedings, which were then under the CAB's jurisdiction, as well as for economic proceedings. PR-58, January 23, 1962, made final the rules for air safety proceedings. The air safety functions of the CAB were transferred to the National Transportation Safety Board by the Transportation Act of 1966 49 U.S.C. §1654. We note that the NTSB does not now employ the same type procedure that applied to air safety proceedings at the CAB (see 14 CFR § 421.41–421.47).

[4] While the rules contained provisions for the form and content of exceptions specifying that they should not be lengthy or repetitive, and should relate only to ultimate conclusions, it was the practice of the CAB practitioners at the time to file a pre-brief in the guise of exceptions.

[5] Even in cases where no exceptions were filed and the Board agreed with the Examiner as to the merits, the Board would issue an opinion and order making the findings and drawing the conclusions necessary to support the decision.

[6] The Board still uses the exception procedure in cases involving international matters subject to approval of the President under Section 801 of the Federal Aviation Act of 1958 49 U.S.C. § 1461. See Rule 30 of the Board's Rules of Practice for this procedure (14 CFR § 302.30)

signed to a particular case, of the Board's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing;[7]

(2) a provision that review of initial decisions is not a matter or right but of sound discretion of the Board;[8] and

(3) a provision specifying the grounds on which petitions for review may be filed.[9]

In short, the new procedure was intended to give the Board the flexibility to lighten its case load and expedite its proceedings by allowing an examiner's decision to become the final decision of the Board without further proceedings where it is well reasoned and based on the evidence of record or not controversial, and where review is warranted, by limiting issues on review to those which are really important and controversial.

The process is a simple one. A party who desires review is required to file a petition for discretionary review within 25 days after service of the initial decision in the case. The petition must allege one or more of the grounds for review specified in Rule 28 (a) (2).[10] Rule 28 calls for a clear concise statement of issues for review and for citations to the record in support of issues.[11] Answers to petitions for review may be filed within 15 days after service of the petition.

Exercise of the discretion to review requires the votes of 2 or more of the 5 Board members. In cases of great importance, the Board occasionally grants review even before petitions are filed.[12] However, the normal course is to await petitions and answers.

Board action on the petitions for review is triggered by a memorandum from the General Counsel to the Board summarizing the petitions for review and answers,[13] and recommending a course of action. Ordinarily the course recommended falls into one of the following categories: (1) decline review and specify the date on which the examiner's decision is to become the decision of the Board;[14] (2) accept review on all issues raised by petitions; (3) accept review as to some issues and decline review as to others.

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[7] 14 CFR § 302.27. This section also provides that the examiners's initial decision shall become effective as the final decision of the Board within 30 days after service if within that time no petitions for Board review have been filed, or the Board has not ordered review *sua sponte*.

[8] 14 CFR § 302.28(a) (1)

[9] 14 CFR § 302.28(a) (2) States that:

"(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

"(i) A finding of a material fact is erroneous;

"(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent;

"(iii) A substantial and important question of law, policy or discretion is involved; or

"(iv) A prejudicial procedural error has occurred."

[10] Petitions for review may not exceed 20 pages.

[11] As was the case with exceptions, the Board does not enforce this requirement, and petitions for review have become pre-briefs.

[12] In these cases, the exception procedure outlined above is usually invoked by the order taking review.

[13] All Board members and their assistants receive copies of the petition and answers when they are filed.

In cases where review is recommended on some or all issues, the memorandum also includes a recommendation as to whether further procedural steps are required. In the great majority of cases, briefs to the Board and oral argument are ordered. But occasionally the Board finds that the nature of the examiner's decision, the status of the record, and the petitions for review are such that no further procedural steps are required.

The General Counsel's memorandum dealing with petitions for review is ordinarily acted upon by notation rather than calendared for discussion—that is, the recommendation is circulated to the Board members in their offices with an action target date stamped on it. The Member notes on the item whether he approves, disapproves (with or without comment or amendments), or desires to have the item calendared for discussion. As stated above, only two votes are required for review.

Several days prior to the oral argument in a case in which review has been granted, the Office of the General Counsel submits a memorandum to the Board members summarizing the briefs of the parties to the Board.[15] The memorandum contains no recommendations and in most cases is distributed directly to the Board members by the cognizant division of the Office of the General Counsel without the personal clearance of the General Counsel or his Deputy.

After the oral argument, the Board deliberates and discusses the case in executive session; and, when decision has been reached, it instructs the appropriate opinion writers so that they may commence work on the opinion.[16] Internal target guidelines for completion of the work are adopted, but these are not rigidly enforced.

When the opinion is completed to the General Counsel's satisfaction, study copies are circulated to the Board members. Each member reviews the document, and, if he approves, he calls for the original opinion and order and affixes his signature and the date thereto. The opinion and order are released when the last member has signed.[17]

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[14] A petition for reconsideration of a Board order declining review will be entertained only when the order declines in part and takes review in part, and then the rules require that the petition for reconsideration be limited to the single question of whether any issue designated for review is so inseparably interrelated to an issue not designated that it cannot be reviewed independently.

[15] The briefs are, of course, circulated to the Board Members and their assistants when they are received.

[16] The opinion writers are attorney advisors employed principally in two operating divisions of the General Counsel's Office—the Routes Division and the Rules and Rates Division.

Approximately eight years have now elapsed since adoption of the discretionary review procedure by the CAB. The Board, its staff and its hearing examiners seem overwhelmingly to approve of the procedure. However, no attempt has been made, until now, to analyze the results in statistical form. Such an attempt follows.

III. EFFECTIVENESS OF THE DISCRETIONARY REVIEW PROCEDURES AT THE CAB

A. *Background Material*

To obtain basic source material for this study, the Chairman of the Administrative Conference requested that the CAB compile and submit to the Conference, for comparison purposes, certain information related to time lapse between initial decision and final Board decision for cases during a representative period immediately preceding the effective date of the discretionary review procedure, and for all cases subject to the procedure decided after the effective date. In answering the request it was necessary for the CAB to sift through and submit information for 348 cases.

The Board submitted the information requested for 145 cases[18] subject to the old exception procedure in which the initial decision was issued subsequent to July 1, 1958,[19] and for 203 cases to which the discretionary review procedure applied.

For the cases using the old procedure the Board indicated by case, the date of the initial decision, the date of the Board order and opinion in which case was decided, the date of any order on petitions for reconsideration, a judgment as to the date on which the case was substantially decided, and the number of days elapsed between initial decision and final Board decision.

The date for cases conducted under the discretionary review procedures included all of the same information, and, in addition, the date of the Board's order dealing with petitions for review, whether review was declined or granted, whether the issues on review were substantially the same or significantly more limited than those pending before the examiner, and whether further procedural steps were ordered.

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[17] Procedures for petition for reconsideration are then available to the parties. 14 CFR § 302.37.

[18] The cases used were only those to which the discretionary review procedure would have been applicable if it had been in effect during the period. Therefore, cases involving decisions which were subject to approval of the President were excluded.

[19] Although the new procedure became effective on February 1, 1962, it was made inapplicable to proceedings in which the hearing had actually commenced on or before that effective date. Therefore, some of the cases included in those decided under the old procedures were actually decided well after the new procedures had become effective.

On the basis of this information, it is possible to construct a fairly reliable statistical picture of the success of the review procedure in expediting cases, by comparing the data before and after adoption of the rule.

Caution is urged, however. While substantial time saving is indicated, all of it cannot be attributed to the advent of the discretionary review procedure. The Board has taken several other steps in the direction of expediting formal proceedings since 1962. Among the most notable of these was the adoption of Subparts M & N of its Rules of Practice in Economic Proceedings.[20] There has also been a general impetus since the middle 1960's to streamline hearings and to speed up the decision of cases. It is difficult, if not impossible, to say what portion of the time savings realized are the direct result of the review procedure rather than the general program. However, it is the consensus at the Board that the review procedure has played a major role in the salutary results, and that it is entitled to a substantial part of the credit.

B. *The Results—Expedition*

The data submitted by the Board indicates that the cases tried under the old system took an average of 213 days between initial decision and final Board decision.[21] Under the discretionary review procedures, the Board reviewed 97 of 203 cases, or 48 percent. The average case required 163 days between initial decision and final decision.[22] This amounts to an average saving of 50 days per case, a significant improvement. But an even better indicator of the value of the rule can be found in the following table:

TABLE A

Cases taking:	Before rule		After rule	
	Number	Percent of total (145 cases)	Number	Percent of total (203 cases)
100 days or less	40	27.58	108	53.20
6 months or less	71	48.96	130	64.03
1 year or less	124	85.51	179	88.17
18 months or less	135	93.10	197	97.04

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[20] 14 C.F.R. § 302.1301–§ 302.1415. These Rules establish priorities for hearing in certain types of cases and very expedited procedures under which they are heard.

[21] Undoubtedly there are atypical cases included in both categories. No attempt has been made to extract these cases on the theory that the results are available for sufficiently representative periods under each category to make the effect of inclusion of these cases on the ultimate comparison negligible.

[22] Cases in which review was granted, either in full or in part, averaged 281 days per case, while those in which review was denied averaged only 56 days per case.

After the rule the Board has been able to complete over half of the cases to which the Rule applies in 100 days or less and almost two-thirds in six months or less. Before the Rule only 28% of the same type of cases were concluded in 100 days and only 49% were concluded within six months.

If we compare the days per case expended under the review rule by calendar year [23] with the overall average time expended of 213 days for those cases to which the old procedures were applicable,[24] we can see that the significant time savings per case were not confined to the early period of the review rule's applicability, but have occurred in all except two of the years of the rule's existence.[25]

TABLE B

Year	After rule no. of cases	After rule average days/case by calendar year	Savings
1962 (6 mos.)	7	48	165
1963	20	115	98
1964	41	195	18
1965	34	157	56
1966	29	168	45
1967	32	154	59
1968	23	108	105
1969 (9 mos.)	14	257	44

The following table breaks down time savings by the major classes of cases handled by the CAB.

TABLE C

Type of case	Saving in days/case	Total cases after rule	Percent of cases where review declined
Rate	149	18	61.11
Enforcement	74	14	64.28
Cert. and Licensing	34	136	47.79
Control and merger *	22	26	61.53

*Acquisition of control and merger cases are not good comparative indicators of time savings because they have always received very expedited treatment by the Board, and, therefore, show the least improvement in elapsed time.

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[23] For this purpose cases have been placed in calendar years by their date of final decision.

[24] 1962 and 1969 should be excluded since the results reported included only 7 and 14 cases respectively for only a portion of each year.

[25] See Section IV–A *infra*, for discussion of FCC experience.

The reasons for the time savings under the new procedure are reasonably apparent from an analysis of the CAB statistics. In cases where the Board has declined review altogether, the average time lapse between initial decision and final decision has been 56 days per case. This can be compared to the average of 281 days per case which has been the experience where review has been granted. The 56 day figure is even more impressive in light of the fact that under the old procedure ten days would have been allowed for exceptions, at least 30 days for briefs to the Board, and probably 10 to 15 more days before oral argument would be heard, depending on the shape of the Board's calendar. Added to this would be the time required even in simple cases to set up a Board meeting convenient to all Members at which the case could be discussed and instructions given.

Where the Board has chosen to limit the issues on review there also appear to be significant time savings. There were 97 cases listed by the Board in which review was granted; the issues were limited substantially in 35 of them. These cases took on the average 82 days less between initial decision and final Board decision than the 62 cases in which the issues reviewed were essentially the same as those before the examiner. Along the same lines, the 20 cases in which no additional procedural steps were ordered took 206 days less than the 77 in which briefs to the Board and oral argument were ordered. It should be pointed out that the cases in which full review is granted and all procedural steps are ordered included the most difficult and important ones which normally take longer to decide than the simpler cases.[26] This detracts from the value of the results of the statistical exercise performed above. However, the fact that a procedure is available to make it unnecessary to use a cannon to kill flies is a very significant benefit in and of itself.

A disturbing element in the process is that for the cases on which review is granted an average of 93 days per case elapse between initial decision and the order granting review. This represents approximately 33% of the average time required between initial decision and final Board decision. Ways of reducing this time should be explored. One possiblility would be, in appropriate cases, oral presentation by the General Counsel to the Board of the matters raised on petitions for review.

In summary, it would appear that substantial time savings have resulted from the use of the discretionary review procedure, to the advantage of the litigants, the Board and the public. The litigants and the public benefit to the extent that it is relieved of the burden of focusing on certain issues, and, when it does decide to review a case, the focus is sharper. It is safe to say from the foregoing statistical analysis that the CAB rule has been an effective tool for the CAB, one which could have similar value to some other agencies.

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[26] Some analysis was performed to determine whether the devices permitting limiting of issues and procedural steps are being used to better advantage as time goes by and experience is deepened. It appears that this has not been the case. And the yearly use of these two devices does not show a trend to either more or less use of them.

IV. COMPARISON OF ADVANTAGES OF FCC REVIEW BOARD PROCEDURE WITH CAB DISCRETIONARY REVIEW PROCEDURES

A. *Introduction*

At the outset, it is to be realized that any comparison of CAB discretionary review procedures and the FCC Review Board must take into account the legislative history of the establishment of the latter Board. In contrast to the action permitting the CAB Reorganization Plan No. 3 to go into effect (see note 1, supra), the Congress rejected the President's Reorganization Plan No. 2 for the FCC, after lengthy hearings,[27] despite its similarity to the Plans submitted for other regulatory agencies (FTC, CAB, SEC).

Instead, the Congress by statute effected precise reorganizations of FCC's structure and procedures by amendments of the Communications Act of 1934, as amended.[28] The pertinent amendment regarding delegation of review functions in adjudicatory cases, the continuing obligations of the Commission members to review such delegated actions, and the composition and qualifications of what later came to be named as the Review Board were specifically laid out in the Act's amendments.[29]

Moreover, the hearings and the Committee's Reports indicated the "built-in" procedural "safeguards" upon which the Congress insisted, insofar as continued participation by Commissioners in the decisional process was concerned, as well as the initial limitations upon the Board's jurisdiction. These matters are treated at length in the Freedman Report. Further, it is clear from this legislative history that a principal, if not the main purpose of the statutory authorization for a review board was not so much a procedural device to avoid delays, as it was to permit the Commissioners to devote a greater amount of their time to the consideration of fundamental policy matters arising out of the rapidly expanding technology and growth of the communications industry.

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[27] See Hearings Before the Committee on Government Operations, U.S. Senate, 87th Congress, S. Res. 142 (Plan No. 2), June 6 and 7, 1961.

[28] Pub. L. 87-192, Aug. 31, 1961, 75 Stat. 420.

[29] See Section 5(d), as amended—47 U.S.C. 155.

Finally, though there is no attempt in this report to analyze the differing statutory staff structures provided for by the Communications Act and the CAB statute, i.e., separation of functions provisions, the provision for a specific opinion writing staff at the FCC Commissioners' level, the role and jurisdiction of the General Counsel in both agencies, it is to be noted that the comparisons which follow must be considered, inter alia, in this light. Likewise, in any such comparison, consideration should be given not only to total workloads, but also the nature and variety of cases which come before the agency. For example, the FCC is one of the few regulatory agencies whose activities are possibly more subject to rapid and radical technological change than in almost any other area. Equally important is the fact that, unlike other regulatory agencies which are responsible for one industry or area of commerce, the FCC has a unique multifaceted responsibility for managing and regulating three basic industry and user groups—broadcast, common carrier and safety and special radio services. Because of the world-wide nature of communications, it must also function on an international basis.

With the foregoing as background, the following analysis will attempt a comparison in those areas of commonality which may obtain in the use of adjudicatory review techniques.

B. *Expedition*

As demonstrated above it would appear that the CAB's review procedure results in significant time savings. These savings seem to have been spread out over the entire existence of the rule rather than restricted to any particular period.

Professor Freedman has made an analysis similar to that made above, to show time savings resulting from the FCC use of an intermediate review Board.[30] He shows quite a large saving of 89 days per case during the first 29 months of the Review Board's existence, but much less impressive figures during the last three years of his analysis.[31] In fiscal 1965 the savings decreased to 33.5 days per case. In fiscal 1966 there was an increase of 5.5 days per case. And in 1967 the time saving was 17.5 days per case.

Mr. Freedman explains the fluctuation in the average time requirements in recent years by citing increases in the Review

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[30] Freedman Study, pp. 14 and 15.

Board's jurisdiction and the need to increase the size of its staff. The resources used by the Review Board will be the subject of a discussion later herein.

C. *Time Savings to Agency Members*

Both procedures undoubtedly save the members of the respective agencies significant amounts of time that they would otherwise spend in consideration of formal proceedings. This is an extremely important factor in a climate of increasing activity at both agencies.

As Professor Freedman's study shows the FCC granted petitions for review of Review Board decisions in only 23 of 175 appeals or 13% of the cases.

The results of the CAB's review procedure are not this impressive. The Board reviewed in whole or in part 97 of 203, or 48%, of the Examiner's initial decisions during the period for which reports were submitted. The ability to limit the issues on review and to control further procedural steps undoubtedly resulted in some savings as well. But it appears that the FCC has found the better method to limit its members' participation.

Some of the credit for this result probably should go to the FCC member's ability to control the natural inclination to participate personally in decisions on the merits. This inclination must be controlled if either the FCC or CAB procedures are to be successful, and the faith that the FCC has in the five well-qualified members of its Review Board undoubtedly has contributed to the better results it has experienced in this regard. Nevertheless, the CAB shows a steady trend downward in the annual percentage of initial decisions reviewed, and it is hoped that the trend will continue in the future.

Moreover, it should be noted that in the 52% of the cases in which review is declined by the CAB, the case is ended quite soon after petitions for review and answers have been filed, after a minimum amount of involvement of staff, Board and party time. Therefore, at the CAB all share in the time savings.

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[31] Professor Freedman also includes time savings for interlocutory matters at the FCC. As a general rule, after an examiner is assigned to a case at the CAB, he passes on all interlocutory matters (14 CFR § 302.18(a) and § 302.18(e)) and the CAB itself considers only those interlocutory matters dealing with significant changes in the scope of the proceeding. These are ordinarily terminated as of the time of the pre-hearing conference. Most other interlocutory matters are handled by the examiner under delegated authority, and may be appealed to the Board only with the consent of the examiner. (14 CFR § 302.18(e)). The examiners have been loath to permit interlocutory appeals.

D. *Quality of Decisions*

Professor Freedman makes the point that the Review Board procedure has resulted in more impartial, better conceived decisions, and better drawn opinions. He observes that Review Board members spend more time reading briefs and reviewing the record than Commission members and that they follow policy made by the Commission instead of making it. Therefore, they are better equipped to use the facts of a given case under policy established by the Commission to arrive at a fair and impartial decision. He contends that the Review Board's isolation from policy making functions is a protection against improper influence by outsiders, and against "hunch" decision making.

These arguments would seem to apply as well to the CAB's discretionary review procedures. In the first place, at the FCC and the CAB, the ultimate power to decide the case rests with the members of the agency. If the members want to decide a case on the merits themselves, for any reason whatsoever, they have the power to do so, Review Board and discretionary review procedures notwithstanding.

Secondly, if delegation of decision making authority to a five man Review Board is a solution to these problems mentioned by Professor Freedman, it would seem that delegation to a qualified impartial hearing examiner would serve the same purpose. The hearing examiner does not make policy, he follows it. He is the decision maker in the chain most familiar with the record and the contentions of the parties and he is isolated from improper influences to the same extent that Review Board members are. Therefore, following Professor Freedman's line of reasoning, the hearing examiner is in an excellent position to assume the responsibility of deciding any case he has heard.

It is not disputed that the Review Board members at the FCC are eminently qualified for their positions,[32] and that they have done their jobs well and to the obvious satisfaction of the Commission.

By the same token, the consensus among CAB practitioners and at the CAB among the Board Members, the staff and the hearing examiners is that the responsibility vested in the hearing examiner under the discretionary review procedure, has improved the quality of the examiner's work product, has improved the prestige of Bureau of Hearing Examiners, and has enabled the Board to dispose of many cases without review.

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[32] The 1961 Amendment to the Communications Act (Sec. 5(d)) set up the necessary qualifications for appointments of members of the Review Board in terms not unlike those for Hearing Examiners under the APA. The members nominated to the Board were approved by the Civil Service Commission, as was the grade classification for such positions (GS–17).

E. Elimination of a Procedural Step

One of the principal advantages of the CAB's review procedure is that, in a number of cases, it permits the elimination of a procedural step—that is, Board review on the merits. The FCC Review Board procedure eliminated that step also, but substitutes therefor Review Board consideration. Thus, even in cases where an examiner's decision may be well reasoned, supported by the evidence of record, and free from legal or factual error, the parties are granted Review Board review as a matter of right.[33]

Thus a major advantage of the CAB procedure is that it accomplishes its results without the necessity of setting up a separate operating entity within the agency and allocating substantial funds to staff it.[34] On the other hand, the FCC was required to commit substantial resources to the establishment of its Review Board.

The Board itself is composed of five members, each of whom hold a GS–17 rank. The back-up professional staff consists of three GS–15's, one GS–14, and eleven attorneys in grades from GS–11 to GS–13. Eight clerical employees complete the staff. This amounts to an expenditure of something in the neighborhood of one half a million dollars in salaries alone. Of course all of this cannot be assessed as additional costs relating to the establishment of the Review Board. Even if the Review Board did not exist a number of the poeple employed by it would be used to perform similar tasks, such as opinion writing, within the agency. Nevertheless, the commitment of this number of people to Review Board activities alone is a sizeable undertaking which could make small agencies or agencies which have fewer hearing cases than the FCC reluctant to set up a Review Board.

V. *Conclusion*

Basically this paper reports on the results and advantages of the CAB's discretionary review procedure. No additional study was made of the FCC's Review Board and there was no intention to disparage that process. The FCC believes that it has been a successful program for that agency and there is no reason to quarrel with its position.

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[33] But see the discussion in the Introduction to Section IV, supra, regarding the statutory imposition for mandatory review in FCC cases.

[34] This is not to say that the discretionary review procedure does not cost the CAB money. Members of the General Counsel's staff must be assigned to such tasks as analyzing Petitions for Review and preparing the memorandums to the Board recommending action of these petitions. However, these activities fit in well with the other functions of these attorneys, such as writing opinions, and dealing with informal matters, and they are not significantly different or more time consuming than tasks performed by the attorney advisors in the General Counsel's Office under the old review procedures.

On the other hand the matters discussed above certainly show that the CAB procedure compares very favorably with the FCC's for the number and types of cases handled by the CAB. By use of discretionary review the Board has been able to expedite formal cases, save Board members' time, improve the quality of its hearing examiners and their decisions, and eliminate an unnecessary procedural step in some instances. It has accomplished this without the expenditure of substantial funds.

The discretionary review procedure used at the Civil Aeronautics Board is well worth serious consideration by other administrative agencies.

RECOMMENDATION NO. 7

ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW

RECOMMENDATION

Title 28 of the United States Code should be amended to eliminate any requirement of a minimum jurisdictional amount before U.S. district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law. This amendment is not to affect other limitations on the availability or scope of judicial review of Federal administrative action.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 7

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An anomaly in the law relating to federal-court jurisdiction deprives a United States district court, otherwise competent, to entertain certain cases involving "nonstatutory" review of federal administrative action in the absence of the jurisdictional-amount requirement of 28 U.S.C. § 1331 (1964) (the general "federal question" provision). These cases "arise under" the federal Constitution or federal statutes and—unless barred by the doctrine of sovereign immunity and subject to the various limiting rules of standing, exhaustion of remedies, finality, ripeness, and so on—they are appropriate matters for the exercise of federal judicial power. The purpose of this recommendation, as it plainly states, is to correct this anomaly by conferring original jurisdiction on district courts of "any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of federal law."

Nonstatutory review of federal administrative action has recently been summarized by Professor Byse:

> The litigant who seeks judicial review of a federal administrative determination must, of course, bring his action in a court which Congress has authorized to hear the controversy. If the petitioner can show that he is "aggrieved" or "adversely affected" by an "order" of one of the major regulatory agencies, the jurisdictional hurdle will easily be surmounted, for most regulatory statutes specifically authorize such persons to secure judical review in a named court or courts. If the statute from which the agency derives its powers does not contain a specific review provision, the necessary congressional authorization may appear in another statute, such as the Review Act of 1950 [5 U.S.C. § 1031–42 (1964)], or, possibly, section 10 of the Administrative Procedure Act [5 U.S.C. §§ 701–06 (Supp. II, 1967)]. Whether an action for review is brought pursuant to a specific or general statutory review provision, the theory is the same: Congress has directed the judiciary to review the ad-

> ministrative determination; so long as the statute does not transgress constitutional limitation, it is the court's duty to comply with the congressional directive.
>
> If the litigant is unable to ground his action on either a specific or a general statutory review provision, judicial relief is not necessarily foreclosed, for he may still be able to institute a "nonstatutory" review action. . . .
>
> The litigant who seeks review under this theory will institute an action in a federal district court against the individual whose action or inaction as a government official allegedly invades his legal rights. The remedy usually sought is an injunction, often accompanied by a request for relief under the Declaratory Judgment Act [28 U.S.C. §§ 2201–02 (1964)]. More often, the nonstatutory review action is based upon a jurisdictional provision enacted as part of a substantive statute, such as section 279 of the Immigration and Nationality Act of 1952, which states that district courts shall have jurisdiction of "all cases, civil and criminal, arising under any provision of this title." [8 U.S.C. § 1329 (1964)]. More often, the nonstatutory review action is based upon a jurisdictional section of title 28 of the United States Code, such as section 1331, the general "federal question" jurisdictional grant (which is subject to the requirement of the $10,000 jurisdictional amount) or sections 1337 and 1339, which confer "original jurisdiction" without regard to jurisdictional amount on the district courts of any civil action "arising under" any act of Congress "regulating commerce" or "relating to the postal service."

Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308, 321–23 (1967) [footnotes omitted].

Under present law there are a significant number of situations involving "nonstatutory" review in which a plaintiff must ground his action on the "general federal question" section of the Judicial Code, 28 U.S.C. § 1331, and must be prepared to establish not only that the action arises under the Constitution, laws or treaties of the United States but also that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs." In some of these cases the jurisdictional-amount requirement cannot be met because it is impossible to place a monetary value on the right asserted by the plaintiff. How is one to value an individual's claim that he is entitled to remain free from military service, to travel abroad, or to remain free from continuous police surveillance? In other cases the plaintiff's claim that he is entitled to a federal grant or benefit (*e.g.*, federal employment, use of public lands) may be assigned a monetary value, but the amount in controversy may be $10,000 or less. Judicial review of these and similar claims may be unavailable or limited in scope for other reasons, but judicial consideration of the plaintiff's claim should not be foreclosed solely because of lack of jurisdictional amount.

The problem is illustrated by the recent case of *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.J., 1968), in which four Selective Service registrants challenged the constitutionality of college-student deferments provided by the Military Selective Service Act of 1967, 50 U.S.C. § 456(h) (1) (Supp. 1967), on the ground that student deferments arbitrarily discriminate against persons who are economically unable to attend college. The three-judge district court, in an opinion by Judge Hays, granted the government's motion to dismiss for lack of jurisdictional amount:

> . . . The injury claimed is an increased likelihood of induction, because, so the plaintiffs allege, registrants who are deferred as students thereby ordinarily postpone their induction for several years and in many cases escape service entirely by acquiring other deferments. . . .
>
> . . . Jurisdiction of this suit is claimed under 28 U.S.C. § 1331, the general federal question statute, which requires that "the matter in controversy" exceed "the sum or value of $10,000." Plaintiffs' counsel concedes that he cannot prove that any of the plaintiffs will suffer a monetary loss of more than $10,000 by reason of the injury alleged.
>
> It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in *Barry* v. *Mercein*, 46 U.S. (5 How.) 103 (1847), a child custody case. The "right to the custody, care, and society" of a child, the court noted, "is evidently utterly incapable of being reduced to any pecuniary standard of value, at it rises superior to money considerations." 46 U.S. at 120. Since the statute permitted appeals only in those cases where the "matter in dispute exceeds the sum or value of two thousand dollars," the court concluded that it was without jurisdiction: "The words of the act of Congress are plain and unambiguous. . . . There are no words in the law, which by any just interpretation can be held to . . . authorize us to take cognizance of cases to which no test of money value can be applied." 46 U.S. at 120. Subsequent decisions have followed this reasoning. See *Kurtz* v. *Moffitt*, 115 U.S. 487, 498 (1885); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (1882); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); *Carroll* v. *Somervell*, 116 F.2d 918 (2d Cir. 1941); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (2d Cir. 1924); 1 Moore, Federal Practice § 0.92[5] (2d ed. 1964).

Judge Edelstein dissented, arguing that the plaintiffs' allegation that the matter in controversy exceeded $10,000 should not be scrutinized, at least where the defendant did not move to dismiss on that ground, or, alternatively, that the court should "assume that freedom from an unconstitutional discrimination exceeds the sum or value of $10,000." He suggested that the jurisdictional-amount requirement was an unconstitutional one in situations, such as this, in which the action, because it is against federal officers, could not be brought in a state court.

The reasons for objecting to the absence of federal jurisdiction in a case like *Boyd* v. *Clark* are readily apparent. The factors relevant to the question of whether or not a federal court should be available to a litigant seeking protection of a federal right have little, if any, correlation with minimum jurisdictional amount. Instead they involve such considerations as whether there is a need for a specialized federal tribunal and whether there are defects in the state judicial system that might substantially impair consideraton of the plaintiff's claim. These factors have special force in the type of cases with which this recommendation is concerned—where specific relief is sought against a federal officer—because state courts generally are powerless to restrain or mandamus the action of a federal officer taken under color of federal law. See Arnold, *The Power of State Courts To Enjoin Federal Officers,* 73 Yale L.J. 1385 (1964). Unlike other federal-question cases subject to the jurisdictional-amount requirement, such as cases attacking state statutes on federal constitutional grounds, denial of a federal forum for lack of jurisdictional amount may be a denial of any remedy whatsoever. As Judge Edelstein pointed out in his dissent in *Boyd* v. *Clark,* jurisdictional provisions which deny a litigant any opportunity to present federal constitutional claims may themselves present constitutional difficulties.

The lack of a state forum in actions against federal officers serves to distinguish this recommendation from other and more general proposals to eliminate the jurisdictional-amount requirement in federal-question cases. The American Law Institute, for example, has tentatively recommended that the jurisdictional amount requirement be abandoned in federal question cases. ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1311 and commentary at 172–76 (1969). Whether or not these broader proposals are accepted, the narrower problem with which this recommendation is concerned needs correction.

It is unclear why Congress, when it increased the jurisdictional amount in diversity-of-citizenship cases in 1958 from $3,000 to $10,000, also raised the minimum jurisdictional amount in federal question cases arising under 28 U.S.C. § 1331. The legislative history merely asserts that the effect of the change is insignificant because the only cases affected are those involving the constitutionality of state statutes and those arising under the Jones Act. Virtually all other cases were said to fall within one of the special federal question statutes which require no minimum jurisdictional amount. See, *e.g.*, 104 Cong. Rec. 11508 (June 30, 1958). If this were the case it is difficult to see why the provision was enacted, since the only purpose of increasing the jurisdictional amount was to reduce the workload of the federal courts, a purpose which would not be advanced if federal-question cases were unaffected. See Friedenthal, *New Limitations on Federal Jurisdiction*, 11 Stan. L. Rev. 213, 216–18 (1959).

The assertion, however, that the significant cases which arise under section 1331 are limited to the two categories mentioned is misleading and erroneous. There is an important third category, with which this recommendation is concerned, in which persons aggrieved by federal administrative action are seeking nonstatutory review in an action brought against the officer. In these cases the plaintiff must follow one of the following courses: (1) satisfy the minimum jurisdictional amount required by 28 U.S.C. § 1331; (2) bring his action in the District of Columbia; (3) cast his action in the form of a mandamus proceeding, thus qualifying under the provisions of the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e) (1964); or (4) persuade the court that section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701–04 (Supp. II, 1967), provides an independent jurisdictional basis for judicial review of federal administrative action, a proposition that is much in doubt. Brief consideration will be given to the unsatisfactory nature of each of these alternatives.

1. *Satisfying the minimum jurisdictional amount.* The principles for determining whether the amount in controversy satisfies statutory requirements are well-established. The plaintiff has the burden of alleging and proving jurisdictional facts. The plaintiff's ad damnum is ordinarily taken at face value unless it appears not to have been made in good faith or the court believes as a matter of legal certainty that the value of the right in controversy is less than the minimum amount. *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288–89 (1938). There is no guarantee, however, that the court will not examine in detail the value of the plaintiff's claim. In *Carroll* v. *Somervell,* 116 F.2d 918 (2d Cir. 1941), for example, where a federal employee sought to enjoin his dismissal for failure to sign a non-Communist affidavit, the employee alleged loss of standing in the community in excess of $3,000. Nevertheless, the case was dismissed for lack of jurisdictional amount on the ground that the value of the claim was measured by the maximum compensa-

tion—less than $3,000—that the employee would be entitled to receive during the ensuing year.

As the *Carroll* case indicates, the methods of valuation in injunction suits are conservative. In *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936), it was held that in an attack on a regulatory statute the amount in controversy is not the value of the business or other activity regulated but the difference between its value regulated and unregulated. See also *Healy* v. *Ratta*, 292 U.S. 263 (1934) (the amount in controversy in tax litigation is measured by the amount of the tax rather than of the penalty). Although some cases ignore these principles by treating the plaintiff's ad damnum as conclusive, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83 (1968) (federal taxpayer's attack on federal grants to religious schools); *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956) (attack on selective service classification), a plaintiff seeking judicial review of federal administrative action cannot rely on this approach being taken.

Although many nonstatutory review actions can be based upon special jurisdictional provisions such as 28 U.S.C. § 1337 (arising under acts "regulating commerce"), there is a significant residue in which jurisdiction must be predicated upon § 1331, the general federal question provision which requires a jurisdictional amount in excess of $10,000. Cases against federal officers in which the jurisdictional-amount requirement was in issue are listed below.

Reputational or intangible interests that cannot be expressed in money terms: Oesterreich v. *Selective Service System Local Board No. 11*, 280 F.Supp. 78 (D. Wyo. 1968), aff'd, 390 F.2d 100 (10th Cir. 1968), cert. granted, 391 U.S. 912 (freedom from induction resulting from selective service reclassification); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. den.*, 379 U.S. 1001 ("Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy [by continuous FBI surveillance]"); *Jackson* v. *Kuhn*, 254 F.2d 555 (8th Cir. 1958) (constitutionality of military presence at Little Rock High School; jurisdictional-amount requirement held not satisfied); *Vorachek* v. *United States*, 337 F.2d 797 (8th Cir. 1964) (disclosure of confidential information concerning plaintiff by federal officers).

Employment interests: Neustein v. *Mitchell*, 130 F.2d 197 (2d Cir. 1942) (loss of state office because of federal enforcement of Hatch Act prohibitions on political activity); *Carroll* v. *Somervell*, 116 F.2d 918 (2d Cir. 1941) (value of federal employment measured by lost wages); *Fischler* v. *McCarthy*, 117 F.Supp. 643 (S.D.N.Y. 1954), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954) (bare allegation that value of federal employment exceeded $3,000 not accepted). Cf. *Friedman* v. *Interna-*

tional Ass'n of Machinists, 220 F.2d 808 (D.C.Cir. 1955) (value of member's explusion from union measured by loss of wages). One line of cases that formerly were troubled by the jurisdictional-amount requirement involved the preferential employment rights of veterans. See *Christner* v. *Poudre Valley Co-op. Ass'n*, 134 F.Supp. 115 (D.Colo. 1955), *aff'd*, 235 F.2d 946 (10th Cir. 1956). This particular problem has now been cured by a statute specifically providing for federal jurisdiction in such cases without regard to jurisdictional amount.

Freedom from regulatory interference: Quinault Tribe of Indians v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966) (freedom of Indian reservation from state civil and criminal authority); *Gavica* v. *Donaugh*, 93 F.2d 173 (9th Cir. 1937) (enforcement of regulations governing grazing on public lands); *Dewar* v. *Brooks*, 16 F.Supp. 636 (D.Nev. 1963) (same); *Wyoming* v. *Franke*, 58 F.Supp. 890 (D.Wyo. 1945) (creation of national monument). Cf. *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F.2d 222, (2d Cir. 1962) (employer's suit to enjoin NLRB regional director from conducting a representation election).

Property rights: Cameron v. *United States*, 146 U.S. 533 (1892) ("It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case"); *Helvy* v. *Webb*, 36 F.Supp. 243 (S.D. Calif. 1941) (value of grazing lands).

Military status: Jones, Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges, 57 Colum. L. Rev. 917, 937–41 (1957): ". . . the jurisdictional amount may prove an insurmountable obstacle since the plaintiff-veteran [in military discharge situations] probably would not be able to establish that the requisite $3,000 is involved in the controversy over the character of his discharge, a matter as to which he has the burden of proof." See also Meador, Judicial Determinations of Military Status, 72 Yale L. J. 1293, 1298 n. 27 (1963).

2. *Litigating in the District of Columbia.* The district court for the District of Columbia has long been viewed as inheriting the inherent and common-law powers of the Maryland courts. Prior to 1962 this meant that, alone of federal courts, those in the District of Columbia possessed the power to issue original writs of mandamus as a general matter. The mandamus problem was taken care of by the Mandamus and Venue Act of 1962, 28 U.S.C §§ 1361, 1391(e), which conferred power on district courts everywhere to entertain "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In addition to its mandamus power, however, the district court for the District of Columbia also "has a general equity jurisdiction," *Stark* v. *Wickard*, 321 U.S. 288, 290 (1944), which it may exercise without regard to the amount in controversy. D.C. Code Ann. §§ 11–521, 11–961, 11–962 (Supp. IV, 1965).

The resulting situation is hardly a logical or defensible one. Congress, disturbed by the inability of litigants to obtain mandamus relief in local courts distributed around the country, conferred such jurisdiction on all district courts, without regard to amount in controversy, in 1962. The more traditional exercise of injunctive or declaratory authority, however, remained subject to the requirement of minimum jurisdictional amount whenever no special federal question statute was available—except in the District of Columbia! The same arguments that supported the Mandamus and Venue Act of 1962—the expense and inconvenience of forcing litigants from all over the country to bring their claims to a District of Columbia court—support the elimination of the remaining anachronism with respect to jurisdictional amount in injunction suits against federal officers.

3. *Relief "in the nature of mandamus."* As has already been indicated, the Mandamus and Venue Act of 1962, 28 U.S.C. §§ 1361, 1391(e), was intended to provide litigants with a convenient local forum in actions to require a federal officer to perform a duty owed to the plaintiff. No jurisdictional amount is required in actions coming within 28 U.S.C. § 1361. In situations where the federal officer does not "owe a duty" to the plaintiff but has unlawfully interfered with the plaintiff's rights—the traditional situation giving rise to injunctive relief—§ 1361 cannot provide the basis for federal jurisdiction. Moreover, since an action under § 1361 is "in the nature of mandamus," there is a risk that the court will hold that a negative decree cannot be issued or that the ministerial-discretionary distinction and other technicalities of mandamus law will significantly narrow the scope of review. These problems are ably discussed by Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967), who conclude that the present existence of the mandamus remedy does not take care of all of the troublesome limitations on the availability of nonstatutory review.

4. *Section 10 of the Administrative Procedure Act as an independent source of federal jurisdiction.* Section 10 of the Administrative Procedure Act provides, subject to some qualifications, that "a person suffering legal wrong because of agency action . . . is entitled to judicial review thereof" and that "final agency action for which there is no other adequate remedy in a court is subject to judicial review." 5 U.S.C. §§ 701–03 (Supp. II, 1967). It also provides that "[t]he form of proceeding for

judicial review" may be brought "in a court of competent jurisdiction." Although the section does not in terms confer jurisdiction on federal courts and was generally viewed as restating the existing law of judicial review, some courts in more recent years have concluded that section 10 is an independent grant of jurisdiction to review "final agency action." *Brennan* v. *Udall,* 379 F.2d 803 (10 Cir. 1967) (Interior determination which adversely affected landowner's title); *Coleman* v. *United States,* 363 F.2d 190 (9th Cir. 1966), *adhered to on rehearing,* 379 F.2d 555 (1967) (Interior determination concerning the validity of a mining claim); *Cappadora* v. *Celebrezze,* 356 F.2d 1 (2d Cir. 1966) (refusal of Social Security Administrative to reopen claim for survivors' benefits) (alternative holding); *Estrada* v. *Ahrens,* 296 F.2d 690 (5th Cir. 1961) (Immigration and Naturalization Service action excluding an alien from entry). It is not clear that the jurisdiction of the district court needed to be rested on section 10 of the Administrative Procedure Act in any of these cases: special federal-question provisions existed in *Cappadora* and *Estrada;* and it is probable that the minimum jurisdictional amount under §§ 1331 could have been satisfied in *Brennan* and *Coleman.* None of the cases contains an extensive or reasoned discussion of the question whether section 10 is in fact an independent ground of subject-matter jurisdiction in federal courts.

A number of cases have reached the conclusion that the Administrative Procedure Act is not a source of jurisdiction: *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967) (attack on manner of holding tribal election); *Chournos* v. *United States,* 335 F.2d 918 (10th Cir. 1964) (Interior determination concerning the validity of placer mining claim); *Local 542, Operating Engineers* v. *NLRB,* 328 F. 2d 850 (3d Cir. 1964) (NLRB refusal to hold representation election); *Ove Gustavsson Contracting Co.* v. *Floete,* 278 F. 2d 912 (2d Cir. 1960) (termination of government contract); *Kansas City Power & Light Co.* v. *McKay,* 225 F.2d 924 (D.C. Cir. 1955) (federally-supported power program). These decisions are no more satisfactory than those going the other way. The *Chippewa* case merely states a conclusion that section 10 "does not confer jurisdiction upon federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction." *Chournos* really involves the separate problem of whether section 10 waives sovereign immunity, while the *Kansas City Power* case involves standing and not subject-matter jurisdiction. The other two cases appear to be correctly decided on other grounds: nonstatutory review of NLRB matters under the doctrine of *Leedom* v. *Kyne*, 358 U.S. 184 (1958), takes place in district courts rather than, as was urged in the *Local 542* case, in a court of appeals; and district court jurisdiction of claims arising out of government contracts, the matter at issue in *Ove Gustavsson*, is precluded because of the existence of an adequate statutory remedy.

The Supreme Court has not yet spoken on the question, despite the conflict of circuits, although in *Rusk* v. *Cort*, 369 U.S. 367, 371–72 (1962) (passport issuance), the Court appears to have assumed that section 10 is a grant of jurisdiction. Thus the question remains an open one.

If the Supreme Court were to hold that section 10 of the Administrative Procedure Act is an independent ground of federal jurisdiction, that holding would go far to ameliorate the problems with which this recommendation is concerned. Cases seeking judicial review of federal administrative action would be entertained by federal courts without regard to jurisdictional amount, except in those situations exempt from the Administrative Procedure Act or included within the qualifying phrase of section 10: "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. . . ."

The Committee on Judicial Review, believing that it is not its function to interpret federal statutes, takes no position on whether section 10 now provides for federal jurisdiction in cases involving final action of federal officers or agencies. The Committee merely states a conclusion of policy—there should be no jurisdictional-amount limitation on suits against federal officers seeking injunctive and declaratory relief. Since it is at least doubtful whether this objective can be reached by interpretation of existing legislation, the Committee urges enactment of specific legislation to handle the problem.

It should be noted again that the grant of subject-matter jurisdiction without regard to jurisdictional amount would not impair the doctrine of sovereign immunity or affect any of the other rules and doctrines that limit the availability and scope of judicial review of official action: (1) the plaintiff's lack of standing; (2) the absence of a matured controversy; (3) the availability of an alternative remedy in another court; (4) the express or implied preclusion of judicial review; (5) the commission of the matter by law to the defendant's discretion; (6) the privileged nature of the defendant's conduct; (7) the plaintiff's failure to exhaust his administrative remedies; and (8) the discretionary authority of a court to refuse relief on equitable grounds.

RECOMMENDATION NO. 8

JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS

RECOMMENDATION

Judicial review of orders of the Interstate Commerce Commission in cases where at present a special three-judge District court is used under 28 U.S.C. 2325 should be by petition to review in the U.S. Courts of Appeals in the same general manner as review of agency orders under the Judicial Review Act of 1950, 28 U.S.C. (Supp. II, 1967) 2341–2352.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 8

For historical reasons, procedures for review of orders of the Interstate Commerce Commission differ from the usual patterns which have developed governing judicial review of administrative action. Since 1903 orders of the Commission (other than those involving only the payment of money) have been reviewed by three-judge district courts specially constituted under authority of 28 U.S.C. 1336, 2284, and 2325. The decisions of these courts may be taken to the Supreme Court by direct appeal rather than by petition for certiorari.

The 1961–62 Administrative Conference of the United States considered the question fully and concluded that the reasons for conforming procedures for review of these orders to accepted concepts of judicial review far outweigh the reasons for perpetuating present procedures. In particular, substitution of the court of appeals for three-judge district courts and elimination of direct appeals to the Supreme Court would reduce the heavy strain on judicial resources imposed by the convening of three-judge district courts and lighten the docket of the Supreme Court. Recommendation 3 of the 1961–62 Administrative Conference proposed the elimination of the use of special three-judge district courts for review of these ICC orders and the substitution of review in courts of appeals as is generally the case with orders of other Federal regulatory agencies. Recommendation 4 proposed further procedures for improving judicial review of ICC orders, all of which were designed to increase efficiency and save time, effort, and expense in appellate procedures.

Identical bills incorporating the substance of Recommendations 3 and 4 were introduced in the 90th Congress, Second Session as S. 2687 and H.R. 13927. S. 2687 was passed by the Senate, 114 Cong. Rec. S10282 (Sept. 5, 1968), but no action was taken in the House of Representatives. It appears likely that the bills will be reintroduced in the next session of Congress.

The reasons that supported Recommendations 3 and 4 remain as valid today as they were six years ago. A detailed statement of those reasons is contained in the reports submitted by the Committee on Judicial Review to the previous Administrative

Conference in support of Recommendations 3 and 4, attached hereto as Appendix I. We urge the reaffirmation of these recommendations.

APPENDIX A

1961 RECOMMENDATIONS 3 AND 4 WITH SUPPORTING REPORT

RECOMMENDATION NO. 3

It Is Recommended That—

(1) review of Interstate Commerce Commission orders should be upon appeals to the United States Courts of Appeals in all cases where at present a special three-judge court is used; district courts should be relieved of their jurisdiction of such cases under 28 U.S.C. 1336, and the courts of appeals should have exclusive jurisdiction to review these orders of the Commission;

(2) final review of orders of the Interstate Commerce Commission by the Supreme Court of the United States should be only by petition for a writ of certiorari;

(3) review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

RECOMMENDATION NO. 4

It Is Recommended That—

Procedures for judicial review of orders of the Interstate Commerce Commission by courts of appeals should incorporate the following features:

(1) A limit of 60 days should be imposed as the time within which a petition for review must be filed in any case for which the present statutory provisions do not fix a period for filing petitions for review, such 60-day period to run from the date of entry of the order appealed from or entry of an order denying reconsideration thereof where petitions for consideration are allowed by the Commission's rules, whichever is later.

(2) Appeals should be commenced by the filing of a petition for review in the form of a notice of appeal.

(3) Anyone seeking review should be required to serve notice of appeal upon all parties to the proceeding before the Commission, the Department of Justice, and the Commission.

(4) When several appeals are taken from the same order of the Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should be considered as taken to the same court, consolidated therewith, and handled as one appeal.

(5) The Commission should provide the record of its proceedings on appeal and should transmit the record to the court. Until such time as procedures are developed whereunder the Commission may use mechanical facilities and methods for the production of the record in its proceedings in such form as to obviate printing or other reproduction of the record for judicial review, and provision is made for the designation of record after the filing of briefs, as recommended by the Conference, the record on appeal should consist of

the entire record before the Commission, and should be transmitted to the court within the time allowed for the filing of briefs. The record should be returned to the Commission upon final decision of the appeal.

Supporting Report of the Committee on Judicial Review

We ask that the Administrative Conference of the United States adopt the following recommendations:

1. The Administrative Conference recommends that review of Interstate Commerce Commmission orders should be by appeal to the Courts of Appeal in all cases where at present a special three judge court is used. District Courts should be relieved of their jurisdiction under 28 U.S.C. 1336 and the Courts of Appeal should have exclusive jurisdiction to review these orders of the Commission.

2. The Administrative Conference recommends that final review by the Supreme Court of Interstate Commerce Commission orders should be only by petition for a writ of certiorari.

3. The Administrative Conference recommends that review of Interstate Commerce Commission orders should be permitted in any judicial circuit wherein is the residence or principal office of the party or any of the parties filing the request for review.

4. The Administrative Conference recommends that there should be a 60 day time limit on all appeals from Interstate Commerce Commission orders to the Courts of Appeal. Notice of appeal should be filed within 60 days after entry of the order appealed from or after entry of an order denying reconsideration of such order where petitions for reconsideration are alllowed by the Commission's rules, whichever is later.

5. The Administrative Conference recommends that the Interstate Commerce Commission should provide and transmit the record upon appeal. Until effectuation of the Recommendations in Group II, the record on appeal should consist of the entire record before the Commission and should be transmitted to the Court within the time allowed for submission of the final briefs of appellees on the appeal. The record should be returned to the Commission upon final decision of the appeal, or upon the printing of the record on appeal to the Supreme Court, whichever is earlier.

6. The Administrative Conference recommends that when several appeals are taken from the same order of the Interstate Commerce Commission, the venue should be determined by the first notice of appeal to be filed, and all subsequent appeals should

be considered as taken to the same court and consolidated therewith and handled as one appeal.

7. The Administrative Conference recommends that appeals from Interstate Commerce Commission orders should be commenced by the filing of a petition for review in the form of a notice of appeal.

8. The Administrative Conference recommends that anyone seeking review of an Interstate Commerce Commission order should be required to serve notice of appeal upon all of the parties to the proceeding before the Commission, and upon the Department of Justice, and the Commission. Anyone who is a party to the proceeding before the Commission may intervene as of right in the review proceeding by giving timely notice thereof to the Court, the Commission, the Department of Justice, and all the other parties within 30 days after receiving notice of the appeal. Thereafter, intervention may also be allowed at the discretion of the court.

Note: None of the above recommendations are intended to change the present law with respect to reviewable acts, the scope of review, or the existing allocation of responsibility and authority between the Commission and the Department of Justice in actions to review or set aside orders of the Commission.

Comments

1. Under the present system, orders of the ICC are reviewed by specially-constituted three-judge federal district courts. 28 U.S.C. 1336, 2284, 2325. It should be noted, however, that so-called reparation orders of the ICC are reviewable by single judge district courts, although these make up only a minor part of judicial review of ICC orders. For all other orders, exclusive jurisdiction for review rests with three-judge district courts; this system has been in effect since February, 1903, although its present statutory base is the Urgent Deficiencies Act of 1913.

2. To the best of our knowledge, the ICC is the sole agency of the United States Government the orders of which are reviewable by three-judge courts. The systems for orders of other agencies, such as the FCC, which formerly were so reviewable have now been changed to provide for review by the Courts of Appeals.

Note: We understand that, with respect to the Department of Agriculture, some use has been made of three-judge courts for review of some D/A programs pursuant to the provisions in 28 U.S.C. Secs. 2281–2282, in connection with injunctions. We are, however, of the opinion that this is a relatively minor problem and should be handled separately from the present problem.

3. The decisions on ICC orders by three-judge district courts now may be appealed directly to the United States Supreme Court. (This is *not* a certiorari proceeding.)

4. In the six-year period from July, 1955 to June, 1961, 398 actions challenging orders of the ICC were instituted. Of these, 159 came in the period of July, 1959 to June, 1961. Orders under attack most often were those involving: rate questions, the grant or denial of certificates of public convenience and necessity and permits; the interpretation of such certificates and permits; mergers and acquisitions; and abandonment and extension of railroad lines.

5. The average length of time from the filing of the complaint to the decision in the district courts, with respect to those cases terminated during the three-year period ending June, 1961, was approximately nine months. Several cases pending for more than two years make that figure somewhat misleading.

6. By and large, with some exceptions, review of the orders of federal administrative agencies is by the Courts of Appeals. This includes the Federal Communications Commission, the Federal Maritime Board, the Federal Power Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board.

Thus it would seem that the trend of modern review statutes is toward use of the several Courts of Appeal. Furthermore, while we understand that some trouble has resulted so far as the FCC is concerned, chiefly because of dual avenues of appeal, it would appear that this trend has been generally efficacious.

7. Although we do not as yet have access to complete data for all of the Courts of Appeals, it would seem that Court of Appeal review of administrative orders, as a general rule, may require a little longer period of time than does the three-judge system now in use for the ICC. For the Court of Appeals for the District of Columbia, which perhaps is the most important of the several circuits so far as review of administrative orders is concerned, the median length of time for review of such orders during the past three fiscal years is as follows:

Fiscal Year 1959	*Fiscal Year 1960*	*Fiscal Year 1961*
Approximately 9 months	Approximately 10.6 months	Approximately 10.5 months

In our judgment, however, this fact—even if it is borne out by data from the other Courts of Appeals—should not be considered conclusive of the question under discussion. At least the following other factors must be weighed and evaluated before reaching a conclusion: (a) the differences, if any, in the type of orders reviewed by the Courts of Appeals from the other agencies as compared to those reviewed by three-judge courts; (b) the importance to be given to the most efficient use of the time of district judges; is the small gain worth the time and trouble of convening three-judge courts? (c) the possible greater degree of expertise in judges of the Courts of Appeals in reviewing administrative orders as compared with the district judges; and (d) the desirability of whether ultimate review by the Supreme Court should be by appeal or by the discretionary writ of certiorari. We believe that the possible—although not yet proved—saving in time for review is outweighed by the other factors mentioned.

8. There is the question whether final review by the Supreme Court should be by appeal as of right or by discretionary writ of certiorari. Although we recognize that arguments may be found on both sides, it is our belief that final review by the Supreme Court of ICC orders should be by writ of certiorari. Our reasons for this position include: (i) apparently, many appeals today from three-judge courts are handled strictly on the pleadings, with no more attention being given to them than for a denial of certiorari in other cases; (ii) the Supreme Court has been criticized of late for assuming too heavy a load; (iii) we perceive no reason why transportation is any more important to the American people than communications, labor relations or natural gas matters, all of which are now subject to final review only by certiorari.

9. Should all of the Courts of Appeal be utilized in review of ICC orders or only one (e.g., the Court of Appeals for the District of Columbia)? There are arguments both ways. Reference to a single Court of Appeals permits the judges of that court to become highly skilled in the intricacies of the agency and thus to render decisions and opinions of high quality. On the other hand, it seems that the ICC bar is relatively decentralized throughout the United States and it might place a burden upon litigants and their attorneys to have to resort to one Court of Appeals only.

We believe that it is in the interests of furthering progress while placing as minimal a strain on existing procedure as is possible to provide for resort to the several Courts of Appeals.

10. There is no statutory time limit for the institution of actions to review orders of the ICC, other than reparation orders,

but the doctrine of laches does apply. We believe that there should be a fixed time limit, and accordingly recommend the provision of 60 days as that limit.

11. Under present procedure, the party seeking review of an ICC order has to furnish a copy of the record before the Commission, get it certified by the Commission, and file it in court. This is at the expense of the party seeking review. Unlike other agencies, the ICC is not required to supply or file the record of its proceedings with the court.

Although we understand that the plaintiff need not file a certified copy of the entire record before the ICC unless he attacks the substantiality of the evidence to support the Commission's conclusions (as he usually does), and also that the record is not printed unless an appeal is taken to the Supreme Court and that Court consents to hear the case on oral argument, we believe that the ICC procedure with respect to the record should be brought into conformity with that of other agencies.

12. Under present procedure there is no provision for consolidating into a single court multiple suits against a single ICC order. We understand that it frequently happens that several actions are started in two or more districts. In our opinion, this practice should be brought into consonance with modern review statutes by a provision that the first notice of appeal to be filed should determine venue, and that all other appeals of that order should be consolidated therewith.

13. The form of review of ICC orders should be changed from the present, original action to that of an appeal, commenced by a petition for review in the form of a notice of appeal.

14. Under present procedure, in actions to set aside ICC orders, the United States is the only necessary party upon whom service of process is required. Other parties to the case before the ICC usually do not have actual notice that the case is being reviewed. We believe that all parties should be notified. Accordingly, we recommend that provision be made for the burden of giving notice of appeal from an ICC order to be placed upon the appellant, that party to be responsible for service of appropriate notice upon all parties to the proceeding before the ICC and upon the ICC and the Department of Justice.

15. The Judicial Conference adopted a resolution in 1943 to the effect that "review of orders of the Interstate Commerce Commission . . . now reviewable by a district court of three judges from whose decision an appeal lies to the Supreme Court, should be made upon petition to the appropriate circuit court of appeals

on the record made before the administrative body; that any further review should be by the Supreme Court on petition for writ of certiorari, and that the United States and the Commission should each have the right to petition for writ of certiorari." This action by the Judicial Conference was taken as a result of a representation by Chief Justice Harlan F. Stone in 1942 that, under existing law, the time of the Supreme Court was being taken in the consideration of appeals of right from three-judge district courts in relation to orders of the Interstate Commerce Commission which did not involve issues important enough to go to that Court, and that the method of review ought to be by certiorari, optional with the court, as is most other cases." (Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress, and Hearings before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress) (1949) (the chronology is set out therein on pages 78 et seq., in a letter dated January 23, 1947, from the Director of the Administrative Office of the United States Courts to the Speaker of the House of Representatives).

RECOMMENDATION NO. 9

STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE.

The technical legal defense of sovereign immunity, which the Government may still use in some instances to block suits against it by its citizens regardless of the merit of their claims, has become in large measure unacceptable. Many years ago the United States by statute accepted legal responsibility for contractual liability and for various types of misconduct by its employees. The "doctrine of sovereign immunity" should be similarly limited where it blocks the right of citizens to challenge in courts the legality of acts of governmental administrators. To this end the Administrative Procedure Act should be amended.

RECOMMENDATION

1. Section 702 of title 5, United States Code (formerly section 10(a) of the Administrative Procedure Act), should be amended by adding the following at the end of the section:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 703 of title 5, United States Code (formerly section 10(b) of the Administrative Procedure Act), should be amended by adding the following sentence after the first full sentence:

> If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 9

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INTRODUCTION

The doctrine of sovereign immunity is merely one piece in the complicated puzzle of remedies against the United States and its officials. The general pattern of which sovereign immunity is but a piece may be described as follows:

It is now generally accepted that courts make a useful contribution to administration by testing the legality of official action which adversely affects private persons. This premise, often referred to as the "presumption of reviewability," is discussed and elaborated by L. Jaffe, *Judicial Control of Administrative Action* c. 9 (1965), and by K. Davis, 4 *Administrative Law Treatise* c. 28 (1958). The presumption of reviewability is reflected not only in court decisions but in a plethora of statutes in which Congress has provided for judicial review of federal administrative action by creating remedies of special or general application. Probably most administrative action is reviewable under these "statutory review procedures." Moreover, two traditional areas in which sovereign immunity was especially powerful—actions to recover tort and contract damages from the United States—are now covered by detailed statutory enactments: (1) *contract actions* against the United States have been handled since 1855 by the Court of Claims, and, since the enactment of the Tucker Act in 1887, also by federal district courts when the amount of the claim does not exceed $10,000 (see 28 U.S.C. §§ 1346, 1491); and (2) *tort actions* against the United States may be entertained pursuant to and subject to the limitations of the Federal Tort Claims Act of 1946 (see 28 U.S.C. § 1346(b), 1402(b), 1504, 2110, 2401, 2402, 2411, 2412, 2671–80). Although there are gaps in each of these statutes that need reexamination (*e.g.*, the

Tort Claims Act is subject to exceptions, some of which are questionable), consideration of sovereign immunity should proceed on the assumption that review of the adequacy of tort and contract remedies against the United States is a matter of another day.

When the existence of these statutory remedies is taken into account, sovereign immunity comes into play primarily in those situations in which an individual complains that the Government or its officer has violated or intends to violate a duty which the Constitution, a statute, or the common law imposes upon the Government and no statutory remedy has been provided. The individual must invoke the special or general federal-question jurisdiction of a United States district court in a nonstatutory review proceeding seeking injunctive, mandatory, or declaratory relief. It is in these situations that sovereign immunity may be invoked by the Government as a limitation upon the court's jurisdiction and power. This is the area with which this recommendation is concerned.

The rule that the United States cannot be sued without its consent developed slowly during the nineteenth century as a tacit assumption rather than a reasoned doctrine. Federal courts were not given general federal-question jurisdiction until 1875 and there was therefore little occasion for square holdings on the matter. Most of the early dicta on the subject came in cases advocating a strict construction of the Court of Claims Act to preclude other contract remedies. As late as 1882, Justice Miller—striving to interpret the scope of the immunity in the light of the reasons for it—observed that "while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as established doctrine." *United States* v. *Lee,* 106 U.S. 196, 207 (1882).

At various times it has been stated that the basis of the doctrine is (1) the traditional immunity of the English sovereign, surviving by implication the grant of judicial power in Article III (see Hamilton, *The Federalist,* No. 81); (2) the inability of the courts to enforce a judgment (see Jay, C. J., in *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 478 (1793); and (3) the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends" (see Holmes, J., in *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353

(1907)). These conceptual arguments for sovereign immunity are now totally discredited. The only rationale for the doctrine that is now regarded as respectable by courts and commentators alike is that official action of the Government must be protected from undue interference. See *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949) (Douglas, J., concurring); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 Harv. L. Rev. 1060 (1946); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,* 75 Harv. L. Rev. 1479, 1484–93 (1962); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis,* 9 J. Pub. L. 1–23 (1960); Davis, 3 *Administrative Law Treatise* c. 23 (1958 and 1965 Pocket Part); Jaffe, *Judicial Control of Administrative Action* 197–231, 348–53 (1965); Note, *Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827–64 (1957). The articles and materials cited above constitute a basic bibliography on the subject.

The doctrine of sovereign immunity has never had the effect of insulating official conduct from judicial scrutiny and control. Through one device or another federal courts have always entertained suits which were directed against the sovereign in the sense that the proceeding challenged official conduct and required officials to do or not do particular things. Although not always perceived in this fashion, largely because of the direction in which developing doctrine channelled thinking, sovereign immunity has always been a question of whether particular conduct should be reviewable in the courts and not whether the sovereign has consented to suit.

Professor Byse has summarized the fictional metamorphosis which allowed private individuals to obtain judicial review of "sovereign" acts:

> "In light of the failure of Congress to provide a statutory method of review during the formative era of administrative law, a literal application of the sovereign immunity doctrine often would have left the citizen remediless against harsh and illegal acts of his government. Such a result could not be tolerated. The courts were equal to the challenge. They reasoned that although the sovereign principal might be immune from suit, the privilege of the principal could not be claimed by the agent, who therefore could be restrained from committing the wrongful act. In the words of a leading case, a public official who acts under an unconstitutional statute or outside his statutory authority is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.' [Ex parte Young, 209 U.S. 123, 160 (1908). . . .] Thus a controversy that was in fact between a private

> person and the federal government was transmuted into a controversy between two private persons. By means of this fiction the courts were able to exert a significant measure of control over the bureaucracy." Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review,* 75 Harv. L. Rev. 1479, 1484–85 (1962).

The basic problem with the sovereign immunity doctrine is that it has developed by fits and starts through a series of fictions. The resulting patchwork is an intricate, complex and not altogether logical body of law. The basic issue—balancing the public interest in preventing undue judicial interference with ongoing governmental programs against the desire to provide judicial review to individuals claiming that Government has harmed or threatens to harm them—is obscured rather than assisted by the doctrine of sovereign immunity in its present form.

I. Sovereign Immunity Prior to Larson

One effect of the sovereign immunity doctrine was to prevent suits against the United States *eo nomine* except as Congress had authorized such units. A complicated body of case law, however, separated situations in which an individual could obtain relief against the Government by suing its officer and situations in which such relief would be unavailable. The law before *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949), cast new gloom into this dark corner of the law, however, was tolerably clear and could be stated in a general way as follows:

A. *In General : Restraining Harmful Conduct*

The most clearly permissible type of action against a government official was that in which (a) the plaintiff sought to enjoin conduct or threatened conduct which, if not officially justified, would constitute a common-law tort, and (b) the relief sought could be given by simply directing the defendant to abstain from what he was doing or threatening to do. Once the plaintiff alleged facts that would entitle him to equitable relief against a private citizen, the fact that the defendant was a government officer did not provide a complete defense but merely an opportunity for justification. The sovereign-immunity doctrine failed to provide official justification in two well-recognized kinds of cases: (1) when the officer was held to have exceeded the authority delegated to him by Congress (*e.g., Land* v. *Dollar,* 330 U.S. 731 (1947) (alternative holding); *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 619–20 (1912); *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94, 109 (1902)); and (2) when the statute that purported to authorize the officer's act was found to be unconstitutional (*e.g.*, *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304–06 (1952); *Ex parte Young*, 209 U.S. 123, 155–60 (1908); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 836–37 (1824)).

When the defendant (a government officer) sought to justify an alleged tort by showing statutory authority, the court could not dispose of the case on the ground of sovereign immunity without deciding the issue of statutory authority thus presented. No distinction was attempted between an allegation of error in the performance of generally authorized duties and an allegation of violation of a statute. Error would support a charge of action in excess of statutory authority unless the action was committed to the defendant's discretion. For example, in *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), a statute authorized the Secretary of War to fix a harbor line beyond which the building of piers or other works was a misdemeanor. A property owner sued to enjoin the Secretary from prosecuting him on account of construction of a wharf beyond the line the Secretary had fixed. The Court, in a unanimous opinion by Hughes, J., granted relief against tortious interference with plaintiff's use of his land:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred." 223 U.S. at 619–20.

These general ideas were modified by special sensitivity to judicial interference when the relief sought fell into any of three special categories: (1) enforcement of contracts against the United States; (2) directing government officers to pay over public moneys; and (3) directing officials to give over property which is in the possession of the United States and to which the United States unquestionably has legal title. Each of these situations deserves some special comment.

B. *Enforcement of Contracts Against the United States*

The immunity of the United States from suit developed in the context of the similar immunity of the states under the Eleventh Amendment. The central notion underlying the Eleventh Amendment was that a court cannot without consent enforce a contract against the sovereign. The provision of a statutory contract remedy against the United States in the Court of Claims was properly viewed as an exclusive remedy. A long line of cases held that federal courts cannot give specific performance of a contract against the United States. *E.g., Wells* v. *Roper,* 246 U.S. 335 (1918); *United States ex rel. Goldberg* v. *Daniels,* 231 U.S. 218 (1913); *Louisiana* v. *Jumel,* 107 U.S. 711, 721, 727 (1882). The damage remedy in the Court of Claims (or in certain instances in the district court pursuant to the Tucker Act) is the *only* remedy.

C. *Orders Directing Payment of Public Moneys*

A case in which the plaintiff seeks to order a government officer to pay over public funds in his possession presents a special problem. Whether the remedy sought is mandamus or injunction, the plaintiff seeks affirmative relief of a particularly delicate kind. Effective government is dependent upon an ample provision of funds, and an order requiring the public treasury to disgorge poses a substantial threat. Consequently, the circumstances under which a court may compel the payment of public moneys are restricted to those in which the official lacks discretion and there is a statutory duty owed to the plaintiff. In *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371 (1945), for example, a government contractor sought to "restrain" the Secretary of Navy from withholding payments allegedly due on a contract. The Secretary had withheld payments pursuant to the Renegotiation Act on the ground that the plaintiff had made excessive profits; the plaintiff contended that the Secretary's conduct was unauthorized and unconstitutional. The Court dismissed the action as one against the United States to which it had not consented. Although framed as a suit for a prohibitory injunction, the plaintiff in fact sought to compel the payment of government funds in a situation in which Congress had not directed that such payments be made. Plaintiff's contract remedy in the Court of Claims was a perfectly adequate one. See also *Morrison* v. *Work,* 266 U.S. 481, 488 (1925) (suit to require officers to sell Indian reservation lands and distribute proceeds to various claimants barred by sovereign immunity).

On the other hand, where a statute imposes a clear duty upon a government officer to pay a claimant, mandatory relief is available in the federal courts. *E.g., Miguel* v. *McCarl,* 291 U.S. 442 (1934) (mandatory injunction against disbursing officer requiring him to pay retirement allowance to which plaintiff was entitled by law); *Roberts* v. *United States,* 176 U.S. 221 (1900) (mandamus directing Treasurer to make certain payments which an Act of Congress, as construed by the Court, required him to make); *Clackamas County, Oregon* v. *McKay*, 219 F. 2d 479 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955) (mandamus directing Secretary of Interior to distribute to certain counties in Oregon the monetary proceeds received by him from the sale of land which had reverted to the United States after certain grantee railroads had forfeited their rights to it; the only action required of the Secretary, according to the court's construction of the statute, was "ministerial" rather than "discretionary").

D. *Orders Directing the Transfer of Government Property*

Apart from cases in which the United States is named as a party defendant, the clearest class of cases which were open to the defense of sovereign immunity under the pre-Larson law were actions to establish an interest in, or satisfy a claim out of, property of the United States, where the United States unquestionably had title and the property was in possession of its officers or agents. *E.g., Maricopa County* v. *Valley Nat. Bank*, 318 U.S. 357, 362 (1943); *Minnesota* v. *United States*, 305 U.S. 382 (1939); *Oregon* v. *Hitchcock*, 202 U.S. 60, 69 (1906); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). Even in this situation, however, mandatory relief is available if a statute imposes a clear duty on the officer in favor of the claimant. *E.g., Wilber* v. *United States ex rel. Krushnic*, 280 U.S. 306 (1930) (mandamus granted directing the Secretary of the Interior to issue a mining patent); *Payne* v. *Central Pac. Ry.*, 225 U.S. 228 (1921) (Secretary of the Interior enjoined from interfering with railroad's selection of indemnity lands when Secretary was under a "plain official duty" without discretion "to substitute his judgment for the will of Congress"); *Lane v. Hoglund*, 244 U.S. 174 (1917).

One situation in which the law was unclear prior to *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), discussed at pp. 15–17, *infra*, was that in which the plaintiff claims title to specific property and the officer defends on the ground that title is in the United States. A venerable earlier case granted relief in this situation, *United States* v. *Lee*, 106 U.S. 196 (1882), but other cases had refused to do so, asserting that the action was against the United States if the property is in its possession. *E.g., Goldberg* v. *Daniels*, 231 U.S. 218, 221–22 (1913) ("the United States is the owner in possession of the vessel"); *Oregon* v. *Hitchcock*, 202 U.S. 60, 70 (1906) ("again, it must be noticed that the legal title to all these tracts of land is still in the Government"); cf. *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582, 596 (D.C. Cir. 1954).

II. DEFECTS OF PRESENT LAW

Professors Hart and Wechsler have suggested that "the Supreme Court in modern times has . . . tended actually to enlarge the scope of sovereign immunity, out of misapprehension of its historical foundations, while at the same time professing to regard it with disfavor as an anachronism which should be narrowly confined." Hart & Wechsler, *The Federal Courts and the Federal System* 1151 (1953). This comment, made in 1953, is even more true today. A series of Supreme Court decisions, beginning with *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and culminating in *Hawaii* v. *Gordon*, 373 U.S. 57 (1963), have strengthened the hold of the sovereign immunity doctrine, created widespread confusion, and directed attention to fictions rather than real problems. If the law of sovereign immunity is in need of reform it is largely because Supreme Court decisions of the last two decades have further complicated a subject that was already confused.

A. *The Larson Case*

In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the War Assets Administrator contracted to sell coal to the plaintiff, but after disagreement over a term of the contract he arranged to sell the coal to a third person. The plaintiff sought to enjoin sale of the coal to anyone but himself, charging that, since title to the coal had passed under the contract of sale, the Administrator was guilty of conversion. The Court denied injunctive relief in a cloudy opinion by Vinson, C. J., that attempted to restate the law of sovereign immunity applicable to suits for nonmandatory injunction against government officers. A suit may be brought against an officer if the officer has acted "unconstitutionally" or "ultra vires his authority." But the mere allegation that the officer, "acting officially" wrongfully holds plaintiff's property, while establishing a wrong to plaintiff, does not establish "that the officer . . . is not exercising powers delegated to him by the sovereign." 337 U.S. at 693. And, again, "a suit may fail . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.*, at 691, n. 11.

The case itself fell squarely between two conflicting lines of authority, one, stemming from *United States* v. *Lee*, 106 U.S. 196 (1882), and *Land* v. *Dollar*, 330 U.S. 731 (1947), in which injunctive relief had been granted for tortious withholding of property now in the possession of the Government, and the other, as in *Goldberg* v. *Daniels*, 231 U.S. 218 (1918), denying relief when the property that the plaintiff complained he had contracted for was in the possession of the Government. The Court could have reached the same result that it did reach by treating the case as an impermissible attempt to obtain specific performance against the Government, or on the ground that plaintiff's proper and adequate remedy was a suit for damages in the Court of Claims.

It is surprising that the *Larson* opinion has had so much influence. The case was decided by a divided Court (6–3) with Rutledge, J., concurring only in the result and Douglas, J., concurring on the narrow ground that an injunction in the situation presented would interfere with the surplus property program. Vinson's opinion, which was confused and rambling, thus had the support of only four members of the Court. It purported to overrule or narrowly limit several well-established lines of cases, including *Land* v. *Dollar*, 330 U.S. 731 (1947), decided only two years before. Nevertheless, the *Larson* opinion has been taken as the modern keystone of the sovereign immunity doctrine.

The *Larson* opinion has four fundamental defects. (1) It holds that the official's conduct, although *wrongful*, may not be enjoined if he is acting within the general sphere of his authority. (2) It determines the application of the sovereign immunity doctrine by a wholly irrelevant test—whether the Government, if a private principal, would be liable for the acts of its agent. (3) The application of sovereign immunity is said to turn on whether the suit is "in effect, a suit against the sovereign" "stopping the Government in its tracks." And (4) the opinion states that affirmative relief may not be granted against a Government officer.

1. *"Error" distinguished from "authority."* The *Larson* opinion limits suits to enjoin officers to:

> "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. . . ." 337 at 689–90.

At a later point in the opinion the Court again distinguishes between action which is erroneous or wrongful ("error") and action which is within the officer's general competence ("authority"):

> "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. . . . There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." 337 U.S. at 695.

Congress, of course, may commit administrative action to agency discretion, thus foreclosing judicial review except for arbitrary or capricious action. "The vice of Larson," however, as Professor Byse has stated, is that it permits—perhaps even encourages—"courts to shirk the hard task of determining the limits of official power":

> "It is perfectly possible for a court to hold that an official has authority to make erroneous as well as correct determinations. Such a holding, of course, should rest on a reasoned determination that Congress intended to confer so broad a discretion. But under *Larson* [and its progeny] the courts seem to interpret that statutes cursorily to authorize the defendant official to act in the 'general' area in question; so long as the official remains within the 'general' area, his erroneous acts are unreviewable whether or not the statute properly construed was intended to confer such an unreviewable discretion. This, I submit, is an abdication of judicial responsibility." Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review, 75 Harv. L. Rev. 1479, 1490–91 (1962).

The *Larson* opinion is thus susceptible to the interpretation that the existence of "statutory authority" need not depend upon a careful construction of the statute in question, but that the case should be dismissed on sovereign immunity ground if the officer is acting within his general sphere of authority even though the particular action is prohibited by the statute properly interpreted.

Numerous decisions of lower federal courts support the proposition that Larson's distinction between "error" and "general authority" has been applied to deprive litigants of judicial consideration of the merits of their claim that an officer's conduct is unlawful. In *Doehla Greeting Cards, Inc.* v. *Summerfield,* 227 F.2d 44 (D.C. Cir. 1955), users of the parcel post service brought an action against the Postmaster General to enjoin him from enforcing increased parcel post zone rates. Plaintiffs alleged that the Postmaster General had failed to comply with a statutory requirement and that the rate order was arbitrary and capricious. The court dismissed on the ground that the suit was "one against the United States to which no consent had been given." The opinion seems to state, relying on *Larson*, that erroneous performance of a statutory duty is the act of the sovereign and cannot be enjoined. Unlike the situation in *Larson*, however, the basic postal law sets forth standards to be observed by the Postmaster General when fixing rate changes of the sort in question in *Doehla*. To say that the defendant may not be enjoined despite a departure from those standards is to flout their very existence. The statute was not construed but ignored. The official is given a wholly unchecked discretion where such discretion was probably denied to him by statute and without inquiry into whether Congress intended such discretion.

Manhattan-Bronx Postal Union v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), is to much the same effect, although the court did undertake in an alternative holding to consider the merits of the claim that the Postmaster General had misconstrued an executive order dealing with collective bargaining by postal employees.

Another troublesome case along similar lines is *Kennedy* v. *Rabinowitz*, 318 F.2d 181 (D.C. Cir. 1963), aff'd on other ground, 376 U.S. 605 (1964), in which the court refused to consider plaintiffs' argument that under the terms of the Foreign Agents Registration Act the Attorney General could not require them to register. The general power of the Attorney General "to construe the individual statutes and apply them to the facts before him" was sufficient to authorize his action and to shield it behind the sovereign-immunity defense. A dissenting opinion pointed out the weakness of the majority's opinion. On certiorari, the Supreme Court ignored its own repeated holdings that sovereign immunity is a jurisdictional issue and proceeded to decide the case against the plaintiffs on the merits.

Other cases in which the court failed to construe the statute to determine whether Congress *intended* the officer to exercise unchecked discretion include *Fay* v. *Miller*, 183 F.2d 986 (D.C. Cir. 1950) (United States attorney has authority to request the telephone company to discontinue service to a plaintiff suspected of gambling, even though the attorney's action might be tortious and taken without sufficient evidence); *Interstate Reclamation Bureau* v. *Rogers*, 103 F. Supp. 205 (S.D. Tex. 1952) (local officials of Department of Labor held to have "authority" to investigate, and even harass, an employer in attempts to induce compliance with the Fair Labor Standards Act, even though the court admitted that the employer's business might eventually be found not to be within the operation of the Act).

2. *Reliance on "normal rules of agency."* A related defect of the *Larson* opinion has also had the effect of increasing greatly the plaintiff's burden of demonstrating an official departure from statute. The Court in *Larson* insisted that a showing of illegality under general law is not sufficient, the determinative question being whether the agent's act is that of the United States. When injunctive relief is sought the answer to this question was said to depend on whether the officer has "authority" in the sense that his actions would be regarded as those of a private principal under the normal rules of agency.

As Professor Byse has said:

> "The weakness of [the *Larson*] reasoning is its failure to deal with a practical problem in practical terms. The basic issue is whether the judiciary should review alleged errors by administrative officials. Because Congress failed to provide a general mechanism for such reviews, the courts developed the fiction that suits to restrain unconstitutional or ultra vires acts were not suits against the government. The reason for the fiction was the practical judgment that although courts should not generally interfere with governmental operations, they should be available to correct administrative excesses. The issue in any doubtful case should be resolved with those practical considerations in mind. Instead of analyzing the problem in these terms, the *Larson* opinion resolves the issue by reference to the 'normal rules of agency.' But the reasons which have caused courts to impose liability on private principals for the acts of their agents have little if any relevance to the question whether allegedly unlawful administrative actions should be subject to judicial review. The incongruous result of the *Larson* case is that to the extent the normal rules of agency impose liability on private principals, governmental officials are immunized from injunctive or declaratory relief. As private liability expands, official responsibility decreases." Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Reviews*, 75 Harv. L. Rev. 1479, 1487–88 (1962).

Despite the incongruity of having Government nonliability turn on whether a private principal would be liable, and vice versa, lower federal courts have sometimes followed the *Larson* approach. In *Hudspeth County Conservation & Reclamation Dist. No. 1* v. *Robbins*, 213 F.2d 425 (5th Cir. 1954), for example, the court cited *Larson* and then concluded: "Applying that test, it seems clear to us that if the dams . . . had been owned by a private corporation whose managers and agents had violated the rights of the plaintiffs in the manner contended in this suit, the private corporation could not escape liability for damages on the ground that its employees were acting outside the scope of their authority." 213 F.2d at 432.

3. *Whether a suit is "in effect, a suit against the sovereign."* Legal fictions may occasionally serve a useful purpose in hastening a transition to sounder rules of law. In emphasizing the fictional aspects of the sovereign-immunity doctrine, however, the *Larson* opinion merely obfuscates the underlying policy considerations. The Court stated that in each injunction suit "the question is directly posed as to whether, by obtaining relief against the officer, the relief will not, in effect, be obtained against the sovereign" because "the compulsion . . . may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred . . . because it is, in substance, a suit against the Government." 337 U.S. at 688. The problem with this formulation is that *all* injunction suits against government officers are designed to provide judicial control of administrative excesses. In *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U.S. 123 (1951), the plaintiff organization sought a declaratory judgment and injunctive relief against the Attorney General for having placed its name on the subversive list without a hearing. The Court held that, for purposes of a motion to dismiss, the Attorney General's act would be treated as unauthorized since it was alleged to be purely arbitrary. The injunction surely "stopped the Government in its tracks" and, in that sense, was directed against the sovereign. Hosts of similar injunction proceedings have been brought against federal officers. In recent years, for example, the Court has ordered the Government to reinstate an employee, *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959), in effect ordered the Government to restore a revoked security clearance, *Greene* v. *McElroy,* 360 U.S. 474 (1959), and in effect ordered the Government to carry particular mail, *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478 (1962).

4. *Whether affirmative relief may be granted.* A footnote to the *Larson* opinion contained a troublesome dictum:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691, n. 11.

If "may" is read as "may" rather than "must," this sentence is not especially confusing. But since the sentence does not indicate any factors to be considered in determining whether affirmative relief is appropriate it suggests that mandatory relief cannot be granted. This erroneous notion has been picked up in subsequent decisions (see the discussion of *Hawaii* v. *Gordon, infra*).

B. *The Malone Case—Property Disputes*

Malone v. *Bowdoin,* 369 U.S. 643 (1962), was an action to eject an officer of the United States Forest Service from land claimed by plaintiffs. The Court held that sovereign immunity barred the action. Under *Larson,* the Court said, an officer may not be sued even for the return of property wrongfully taken or held unless the action is "not within the officer's statutory powers, or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." There was no such allegation in *Malone. Larson,* the Court added, had limited *United States* v. *Lee,* 106 U.S. 196 (1882), to cases where there is a claim that the holding constituted "an unconstitutional taking of property without just compensation." Moreover, *Lee* had been decided when there was no money remedy for the taking; in the present case the Court of Claims was open. See *United States* v. *Causby,* 328 U.S. 256, 267 (1946).

If Congress had authorized federal officers to seize private property and limited the owner's remedy to a damage action in the Court of Claims, the procedure would be constitutional even though harsh. But Congress has not authorized Forest Service officers to seize private land; and the damage remedy in a distant forum is not a totally adequate remedy. The presumption that an officer who takes or withholds land which is admittedly the plaintiff's is acting without authority in absence of an affirmative showing of authority is more consistent with the general preference for judicial control of administrative excesses.

Professor Davis' criticism of *Malone* as "patently unsound" is cogent:

> "The *Malone* opinion seems patently unsound. The case came upon motion to dismiss the action, and the Court assumed the facts to be as stated—that the fee was in the plaintiff and that the government's claim to the land rested only on a life tenant's transfer of a fee to the government. On these facts, the Court should have assumed, in absence of clear congressional intent to the contrary, that of course government officers are not authorized to withhold land from its lawful owner, and that of course the courts are the proper tribunals to determine who is the lawful owner. But instead of making these obvious assumptions, the Court made the opposite assumptions, by saying merely that the plaintiff had not asserted that the officer was exceeding his delegated powers.

> "Mr. Justice Douglas, in an opinion with which Mr. Justice Harlan agreed, asked in dissent: 'If legal title is actually in the claimant, if the action of the official in taking possession under authority of the United States is ultra vires, what objectionable interference with governmental functions can be said to exist?'
>
> "The majority of the Court did not answer the question. The answer is that a judicial determination of title to land is not an objectionable inference with governmental functions, even if the determination is that the private party is the owner of the land and is entitled to its possession. What are courts for if they are barred from adjudicating disputes about land ownership and possession? Who in the entire society is better qualified to resolve a dispute about land titles than the courts?" Davis, *Administrative Law Treatise* § 27.01 (1965 Pocket Parts, p. 147).

In a number of recent cases *Malone* has been applied to deny district courts jurisdiction to consider land disputes between the United States and adjacent property owners. In *Gardner* v. *Harris,* 391 F.2d 885 (5th Cir. 1968), plaintiff's predecessor-in-title had sold land to the United States subject to an easement providing a right-of-way across the conveyed land to abutting property. The conveyed land became part of the Natchez Trace Parkway and the federal officer in charge of the parkway erected barricades across the right-of-way. In an injunction suit seeking removal of the barricades, it was held that sovereign immunity barred the action. Judge Brown reasoned that the judgment would compel the government to act and would interfere with public administration; hence suit could be brought only if the superintendent had exceeded his statutory powers. And the statute authorizing the superintendent to administer and maintain the Natchez Trace Parkway did not contain any express limitation on the superintendent's powers of administration. "Merely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the highway, either as a matter of violation of property rights under the deeds or as a tort under principles of general law, does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers." 391 F.2d at 888.

The *Gardner* decision is the logical stepchild of *Larson* and *Malone,* but the result is indefensible. When government officers mistakenly seize or hold private property, such mistakes both deprive persons of specific property and subject the United States to liability. The relevant question is whether Congress has authorized the seizure or condemnation of private property under the circumstances that existed; and in the absence of such authorization (and the limitation of the property owner to a damage remedy in the Court of Claims) the injunctive remedy should be provided. The courts should assume that Congress intends that officers who deal with property should keep within their powers in taking and withholding property that is claimed by private persons. Unless a vital regulatory program is involved (see discussion of *Dugan* v. *Rank, infra,* pp. 19–20), Congress would probably prefer a prohibitory injunction to a grant of compensation after the fact.

A substantial number of cases follow *Malone* in barring district court suits to resolve property disputes between the United States and private persons. *Switzerland Co.* v. *Udall,* 337 F. 2d 56 (4th Cir. 1964) (similar to *Gardner* v. *Harris*); *Simons* v. *Vinson,* 394 F.2d 732 (5th Cir. 1968) (title to land formed by accretion along river which formed boundary between land owned by United States and land owned by plaintiffs; action barred by sovereign immunity); *Andrews* v. *White,* 121 F.Supp. 570 (E.D.Tenn. 1954), aff'd per curiam, 221 F.2d 790 (6th Cir. 1955) (suit by landowner to enjoin federal officers from enforcing hunting regulations in what might have been part of a national park barred by sovereign immunity); cf. *Zager* v. *United States,* 256 F.Supp. 396 (E.D.Wis. 1966) (quiet title action to determine whether mistake had been made in original land survey *not* barred by sovereign immunity).

Regardless of whether broad proposals to reform sovereign immunity are accepted, the doctrine should be waived to permit property disputes between the United States and private persons to be entertained by district courts. Lawyers in the Department of the Interior, the federal agency having the greatest interest in the matter, do not oppose such a limited reform.

C. *Hawaii* v. *Gordon—Affirmative Relief*

A recent Supreme Court decision has strengthened the erroneous notion, earlier advanced in *Larson,* that affirmative relief may not be granted against government officers. *Hawaii* v. *Gordon,* 373 U.S. 57 (1963), involved the provisions of the Hawaii Statehood Act, which directed the President, if he should decide that certain federal properties were no longer needed by the United States, to convey them to the State of Hawaii. The Director of the Bureau of the Budget, acting for the President, advised federal agencies that this authorization related only to lands that had been ceded to the United States by Hawaii. The State filed an original action in the Supreme Court to compel the Director to withdraw his advice, to determine whether certain property he had excluded was "needed", and, if it was not needed, to convey it to Hawaii. The Supreme Court dismissed the suit: "Relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter [citing *Dugan* v. *Rank*, *Malone* v. *Bowdoin*, and *Larson*]. Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States."

Professor Davis argues that the "issue was not whether the lands should be conveyed—for that question was solely for the President—but whether a report should be made to the President with respect to designated lands. . . . Thus, the sole question was one of statutory interpretation." Davis, *Administrative Law Treatise* § 27.01 (1965 Pocket Parts p. 148).

A federal officer, of course, cannot be ordered by a court to exercise discretion in a particular way. But if a statute requires an officer to exercise discretion and the officer refuses to make the discretionary determination, a court can interpret the statute and require him to exercise discretion. Mandatory relief has been granted against federal officers for many years under such circumstances; and the *Hawaii* case muddies the waters by suggesting that affirmative relief is always barred by sovereign immunity.

D. *Dugan* v. *Rank—Interference with Governmental Programs*

Fictions aside, the application of the sovereign immunity doctrine should rest on whether the benefits of judicial review of administrative action are outweighed by the possible interference with governmental programs that may result from the grant of relief. *Dugan* v. *Rank*, 372 U.S. 609 (1963), involves this question and was correctly decided. *Dugan* was a suit to enjoin the United States and officers of its Bureau of Reclamation from impounding water behind Friant Dam, part of the Central Valley Project in California, on ground that this action interfered with plaintiffs' rights to the use of the water downstream. The Supreme Court held that the United States had not consented to this kind of suit despite the McCarran Amendment, 43 U.S.C. § 666, and that the suit against the Reclamation officers must be dismissed as in substance one against the United States. To enjoin storage of water would require the abandonment of much of the project and "the Government would, indeed, be 'stopped in its tracks' "; to order construction of subsidiary dams to meet the plaintiffs' needs would "not only 'interfere with the public administration' but also 'expend itself on the public treasury.' " The only exceptions to the rule against suits producing these effects, as announced in *Larson* and *Malone,* were inapplicable, for the Government "had the power, under authorization of Congress, to seize the property of the respondents . . . , and this power of seizure was constitutionally permissible."

Unlike the other recent Supreme Court opinions, the *Dugan* opinion did interpret and resolve the statute, holding that Congress had authorized physical seizure of the water and limited affected persons to damage actions under the Tucker Act. Moreover, this conclusion is supported by the practical interference with reclamation projects that would result if the contrary argument had been accepted.

The language of the *Dugan* opinion, however, like that of *Hawaii* v. *Gordon* and *Malone* v. *Bowdoin,* goes beyond this narrow ground, suggesting that sovereign immunity is applicable whenever "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, . . . or if the effect of the judgment would be 'to restrain the government from acting or compel it to act.' " As Professor Davis has stated, "This so-called general rule never has been the general rule and is not likely to become the general rule. Judgments of courts have often expended themselves on the public treasury or domain, have often interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do these things in the future." Davis, *Administrative Law Treatise* § 27.01 (1965 Pocket Part, p. 149).

III. OBJECTIVES OF THE COMMITTEE'S RECOMMENDATION

As the foregoing recital indicates, the Supreme Court has been remarkably receptive to the sovereign immunity doctrine in recent years. The Court now seems to regard it as settled that the general contours of the doctrine were established in *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949). Since there is no discernible pressure for change emanating from the Supreme Court, the impetus for reform must come from Congress. Important questions of policy, calling for legislative judgment, are involved and a legislative approach to the problem is not only appropriate but desirable.

Dissatisfaction with the present doctrine of sovereign immunity is widespread. Professors Byse and Davis have argued persuasively that the sovereign immunity doctrine constitutes a barrier to proper judicial analysis; each has proposed a remedial statute. Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479 (1962); Davis, 3 *Administrative Law Treatise* c. 27 (1958 and 1965 Pocket Part). Professor Jaffe has demonstrated the flimsiness of the doctrine's historical underpinnings and agreed with Byse and Davis that legislative reform is desirable. Jaffe, *Judicial Control of Administrative Action* 197–98, 213–31, and n. 123 (1965). Milton Carrow, a prolific writer on administrative law subjects, concludes that "The doctrine of sovereign immunity has long fulfilled the requirements for 'full abandonment.' " Carrow, *Soveign Immunity in Administrative Law—A New Diagnosis*, 9 J. of Pub. L. 1, 22 (1960). He quotes Professor Walter Gellhorn as stating that

> "today the doctrine may be satisfactory to technicians but not at all to persons whose main concern is with justice. . . . The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words."

Professor David Currie, in a recent article, states that "someday Congress should . . . make a more rational and more liberal reconciliation of individual protection and government elbowroom in suits to enjoin federal officers than that established by the benighted *Larson* decision and its sequels." Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. Chi. L. Rev. 268, 290 (1969). No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years.

This rare unanimity of legal scholarship, however, has not been echoed in court opinions except for recurrent admissions that the subject is a confusing one and that it is not "an easy matter to reconcile all of the decisions of the Court in this class of cases." See *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883); *Brooks* v. *Dewar*, 313 U.S. 354, 359–60 (1941); *Malone* v. *Bowdoin*, 369 U.S. 643, 646 (1962). Judicial dissatisfaction with current law was expressed by Judge Brown in his recent opinion in *Gardner* v. *Harris*, 391 F.2d 885 (5th Cir. 1968), holding reluctantly that sovereign immunity barred a landowner's claim that a federal officer was wrongfully denying him access to his land:

> "With so much done . . . to give the citizen access to a home-based Federal Court, frequently in cases that involve millions of dollars or which affect comprehensive programs, the persistence with which the Government successfully asserts immunity as to property claims . . . [is] unusual. . . . [T]hat Congress does not ameliorate these hardships appears

> even more unusual. . . . And not even equity—the King's conscience—can help." 391 F.2d at 886–87 and n 3.

The Committee on Judicial Review has given careful consideration to the sovereign immunity problem. The Committee decided to study the problem at one of its early meetings in 1968. During the summer of 1968 the Committee's consultant interviewed lawyers in five federal departments that have had considerable experience with sovereign immunity cases: the Departments of Justice, Treasury, Agriculture, Interior, and Health, Education & Welfare. In September 1968 the Committee asked the Department of Justice to comment informally on the Byse and Davis proposals. Helpful memoranda expressing individual rather than official viewpoints were prepared for the Committee's use by the Solicitor General and by the Assistant Attorneys General in charge of the Civil Division and the Land & Natural Resources Division. Later in 1968 the Committee consultant prepared a memorandum on sovereign immunity for the Committee. Another memorandum on the subject, prepared by Professor Davis for an American Bar Association committee, was also made available to the Committee. On December 13, 1968, the chief legal officers of six federal departments (Treasury, Defense, Post Office, Agriculture, Interior, and Health, Education & Welfare) were asked to comment on a specific legislative proposal. Informal responses were received from four of the six departments. In May and July of 1969 the Committee submitted its present proposal (subsequently changed in minor particulars) to the Department of Justice for advice and comment. Helpful advice and comment was received from many individual lawyers in the Department of Justice, from Judge Oscar Davis of the Court of Claims, and from Professors Byse and Davis. In struggling with matters that the Committee has found to be difficult and complex, the cooperation and assistance noted above has proved invaluable. Needless to say, none of the individuals or groups listed are responsible for—nor do they necessarily agree with—the conclusions that the Committee has reached.

The Committee's recommendation is designed to achieve five objectives: (1) to eliminate the artificialities, uncertainties, and occasional injustices of the present case law; (2) to provide a local remedy for the resolution of land disputes between the United States and private persons; (3) to allow the United States to be named as defendant in cases challenging governmental action and to bind the United States by the judgment in an action against an officer when the action challenges official conduct and the Attorney General has controlled the defense; (4) to retain present limitations on the availability and scope of judicial review, thus preventing unwarranted judicial interference with governmental programs; and (5) to retain the present exclusions on the availability of monetary or alternative relief that are embodied in such statutes as the Tucker Act and the Federal Tort Claims Act. Each of these objectives will be considered on the following pages.

A. *Eliminate Artificialities, Uncertainties and Injustices of Present Law*

The ideal of a government under law can be realized only if persons are provided with an adequate set of judicial remedies against that government, its officials, and its agencies. Earlier portions of this report have argued that remedies against the United States are impeded by the unsatisfactory case law relating to the doctrine of sovereign immunity—law that is confused, illogical, and sometimes leads to unjust results. There is need for a limited statutory reform that will

> "rid the law or sovereign immunity of the artificialities and rationalizations, particularly those expressed in the *Larson* case, that have produced an irreconcilable body of case law and have permitted—indeed perhaps encouraged—courts to avoid the difficult task of determining whether, in light of all the relevant considerations, the purposes of the applicable substantive statute would better be served by granting or by denying judicial review." Byse, *Proposed Reforms in "Nonstatutory" Judicial Review*, 75 Harv. L. Rev. 1479, 1525 (1962).

Part (1) of the Committee's recommendation, by prohibiting dismissal of certain actions on the ground that the action was in substance against the United States or that the United States was an indispensable party, withdraws sovereign immunity as a defense in certain actions challenging the legality of federal administrative behavior. Suits challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. The explicit exclusion of monetary relief makes clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgment, mandatory relief, quiet title, and ejectment). Thus the limitations on monetary relief contained in the Federal Tort Claims Act, the Tucker Act or similar statutes are unaffected. The consent to suit is also limited to claims in federal courts; hence the United States would remain immune from suit in state courts. The waiver of immunity extends only to actions challenging the legality of federal action (or non-action); it would not extend to proceedings in which federal officers or agencies are not acting in their "official capacity or under color of legal authority." This language is taken from 28 U.S. C. § 1391(e), which would govern venue and service of process in actions falling within the purview of the recommendation.

Although the recommendation does not use the term "specific relief," the principal effect of the amendment will be to cut off the defense of sovereign immunity in suits for specific relief. Perhaps ninety percent of the cases affected will be suits for injunction or declaratory judgment or for both, and perhaps most of the rest will be suits for relief in the nature of mandamus. But all other specific relief is covered, including specific performance, quieting title, ejectment and habeas corpus. All forms of monetary relief, however, are excluded from the recommendation.

The recommendation is cast in the form of an amendment to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706, rather than as an amendment to Chapter 161 of the Judicial Code, 28 U.S.C., which is concerned with actions in which the United States is a party. This choice limits the effect of the recommendation in important respects:

First, an APA amendment is subject to the exceptions contained in 5 U.S.C. § 701, as well as the exclusions specified in a number of other statutes. The § 701 exceptions include the Congress, the federal courts, territorial governments, District of Columbia government, labor mediation boards, certain military functions, and certain wartime and emergency functions. Other statutes that contain provisions exempting a function from the judicial review sections of the APA include the following: export of scarce materials (50 App. U.S.C. § 2027); selective service proceedings (50 App. U.S.C. § 463(b)); employment and discharge of National Security Agency personnel (50 U.S.C. § 835); renegotiation of defense contracts (50 App. U.S.C. § 1221); certain mine inspection functions (30 U.S.C. § 483); and certain water resource land acquisition functions (33 U.S.C. § 597). The question is whether these indications of congressional desire to foreclose judicial review should be fully respected or whether the abolition of sovereign immunity should be used as a vehicle for providing specific relief in situations in which Congress has placed a function outside of the provisions of the APA (assuming that no other barrier to specific relief exists). The Committee's view is that the category of reviewable action should not be broadened in this manner. Retention of the APA exceptions, unless and until they are abandoned as a general matter, is more consistent with the narrow purposes of our proposal.

Incorporation of the reform proposal in the judicial review provisions of the APA has a second advantage. As is evident from prior discussion, abolition of sovereign immunity cannot be considered except in relation to the general law governing the availability and scope of judicial review. That law is now codified in 5 U.S.C. §§ 701–06; and incorporating the abolition of sovereign immunity in §§ 702 and 703 draws on the broader context. The whole matter, for example, is clearly subject to the prefatory language of § 701(a), "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The same conclusion would probably be reached in any event, but the APA context lends clarity to the limited nature of the proposal.

The only valid office served by sovereign immunity—preventing undue judicial interference with governmental programs that should not be subjected to judicial review—would be performed by the more discriminating and intelligible doctrines governing the availability of judicial review, especially the nonreviewability of action expressly or impliedly precluded from review or committed to agency discretion, and by the equitable considerations that control the grant of specific relief.

An argument occasionally made in defense of sovereign immunity is that it has been so undermined by the suit against the officer that, except in cases involving treasury liability for damages or the disposition of government property—cases perhaps deserving of special treatment—it no longer serves as a barrier to judicial review. It is true that lawyers and judges who have had considerable experience with sovereign immunity usually have little difficulty in sidestepping sovereign immunity in situations in which governmental regulatory or enforcement activity is challenged. These lawyers read *Larson* narrowly as essentially concerned with the forced disposition of property held by the Government where the particular conduct of official, though it may be tortious or wrongful toward the private claimant, *is* authorized by the statute. So read, *Larson* does not stand in the way of the suit against an officer engaged in a regulatory or enforcement activity not involving government property, where the claim is that the officer is acting unlawfully.

This narrow reading of *Larson,* even if correct, is by no means universally accepted. In part II of this report some of the many cases in which the broader *Larson* formulations have led lower courts astray were discussed. Narrower and more refined formulations are necessary; and legislation is probably required to do the job.

It should be emphasized that the application of the artificialities of *Larson* is not restricted to cases involving government property or funds. The cases discussed on pp. 11–12, *supra,* involve regulatory matters, not government property or funds. A partial sampling of recent cases reveals that sovereign immunity has been a serious issue in numerous suits challenging government regulatory and enforcement activity:

> *Agriculture regulation: Garvey* v. *Freeman,* 263 F.Supp. 573 (D. Colo. 1967), aff'd 397 F.2d 600 (10th Cir. 1968) (sovereign immunity did not bar judicial review of determination of normal wheat yields per acre); *Gregory* v. *Freeman,* 261 F.Supp. 362 (N.D.N.Y. 1966) (sovereign immunity barred claim that officials had erred in determining that petitioner was not in compliance with feed grain program); *Moon* v. *Freeman,* 245 F.Supp 837 (E.D.Wash. 1965), aff'd on other grounds, 379 F.2d 382 (9th Cir. 1962) (Sovereign immunity barred suit by wheat processors to enjoin wheat marketing export program to recover funds already paid).
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> *Food and drug regulations: American Dietaids Co., Inc.* v. *Celebreeze,* 317 F.2d 658 (2d Cir. 1963) (sovereign immunity barred action to recover tapes of a concealed tape recorder used by FDA inspectors during an inspection); *Durovic* v. *Palmer,* CCH FDC Law Reports ¶ 40,099 (N.D.Ill.), aff'd on other grounds, 342 F.2d 634 (7th Cir. 1965) (sovereign immunity barred suit to enjoin FDA inspection of facility producing Krebiozen); *Toilet Goods Ass'n, Inc.* v. *Gardner,* 360 F. 2d 677, 683 (2d Cir. 1966), aff'd on other grounds, 387 U.S. 158 (1967) (sovereign immunity does not bar a pre-enforcement challenge by domestic manufacturers of FDA color additive regulations); *Sugarman* v. *Forbragd,* 267 F.Supp. 817 (N.D.Cal. 1967) (sovereign immunity barred challenge of FDA determination that coffee beans could not be imported).
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> *Administration of federal grant-in-aid programs: Lee County School Dist. No. 1* v. *Gardner,* 263 F.Supp. 26 (D.S.C. 1967) (sovereign immunity did not bar challenge of HEW deferral of payment of federal funds to school district); *Dermott Special School District* v. *Gardner,* 278 F.Supp. 687 (E.D.Ark. 1968) (sovereign immunity did not bar school district's challenge of HEW guidelines establishing requirements for federally aided programs). Cf. *Congress of Racial Equality* v. *Social Security Administration* 270 F.Supp. 537 (D.Md. 1967) (suit to require agency to establish an admininstrative procedure pursuant to an executive order concerning equal opportunity in federal employment barred by sovereign immunity).
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> *Subversive activities: Kennedy* v. *Rabinowitz,* 318 F.2d 181 (D.C. Cir. 1963), aff'd on other grounds, 376 U.S. 605 (1964) (sovereign immunity barred action by attorneys representing Cuba for a declaration that Foreign Agents Registration Act did not require them to register); *In-*

dustrial Workers of World v. *Clark*, 385 F.2d 687 (D.C. Cir. 1967) (sovereign immunity did not bar organization's challenge to its listing in "Attorney General's List").

Enforcement of Fair Labor Standards Act: *Wohl Shoe Co.* v. *Wirtz*, 246 F.Supp. 821 (E.D.Mo. 1965) (sovereign immunity barred action seeking a declaration that employer, warned by officers that it was violating the Act, was within designated exemptions); *Capital Coal Sales* v. *Mitchell*, 164 F.Supp. 161 (D.D.C. 1958), aff'd 282 F.2d 486 (D.C. Cir. 1960) (sovereign immunity did not bar challenge of blacklisting of government contractor for alleged violation of Walsh-Healey Act); *Rogers* v. *Skinner*, 201 F.2d 521 (5th Cir. 1953) (sovereign immunity barred action to determine whether plaintiff's employees were covered by FLSA); *Interstate Reclamation Bureau* v. *Rogers*, 103 F.Supp. 205 (S.D.Tex. 1952) (same).

Government employment: *Leber* v. *Canal Zone Central Labor Union*, 383 F.2d 110 (5th Cir. 1967), rev'g 246 F.Supp. 998 (D.Canal Zone 1965) (attack on regulations decreasing overseas differential pay barred by sovereign immunity); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965) (sovereign immunity barred suit challenging Postmaster General's refusal to recognize the plaintiff union as exclusive bargaining representative of certain postal employees); *Mulry* v. *Driver*, 366 F.2d 544 (9th Cir. 1966) (validity of Veteran Administration regulation prohibiting physicians, dentists and nurses from engaging in outside practice; since regulation was authorized, sovereign immunity barred suit). See also *American Guaranty Corp.* v. *Burton*, 380 F.2d 789 (1st Cir. 1967) (sovereign immunity barred a challenge of the validity of a regulation fixing the fees for salaries and expenses of referees in bankruptcy).

Parcel post rates: *Doehla Greeting Cards, Inc.* v. *Summerfield*, 227 F.2d 44 (D.C. Cir. 1955) (sovereign immunity barred challenge of validity of increased parcel post rates); *Summerfield* v. *Parcel Post Association*, 280 F.2d 673 (D.C. Cir. 1960) (same).

Tax investigations: *Reisman* v. *Caplin*, 317 F.2d 123 (D.C. Cir. 1963), aff'd on other grounds, 375 U.S. 440 (1964) (sovereign immunity barred suit by taxpayer's attorneys seeking injunctive and declaratory relief from an IRS summons calling for production of allegedly privileged matter, including the workproduct of the attorneys); *Balistrieri* v. *United States*, 303 F.2d 617 (7th Cir. 1962) (sovereign immunity barred taxpayer from obtaining a declaration that he was entitled to examine documents relevant to tax liability which IRS had subpoenaed from an accountant); *Smith* v. *United States*, 250 F.Supp. 803 (D.N.J. 1966) (sovereign immunity did not bar taxpayer's motion to suppress evidence obtained from them by IRS agent, allegedly in violation of constitutional rights).

The catalog above is an illustrative rather than exhaustive list of recent regulatory and enforcement cases in which the government has urged dismissal—often successfully—on sovereign immunity grounds. Cases in other fields, involving such matters as rural electrification loans, welfare benefits, federal alcohol regulation, correction of military records, and a number of other subjects, might also be cited. Indeed, the Department of Justice appears to assert sovereign immunity, usually as one of a number of grounds for dismissal of the plaintiff's complaint, in a substantial portion of the cases involving nonstatutory review of federal administrative action. Only if tradition or holdings make it clear that the suit against the officer is an appropriate form of judicial review, as in the case of Post Office fraud orders, is the defense not asserted. This practice was recently criticized by Judge Friendly in *Toilet Goods Ass'n* v. *Gardner*, 360 F.2d 677, 683 n. 6 (2d Cir. 1966), aff'd 387 U.S. 158 (1967):

> "[The Government makes] the surprising contention that an action for declaration that federal regulatory officers have acted in excess of their authority constitutes an uncontested suit against the United States. . . . [L]aw officers of the Government ought not to take up the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions."

One wonders whether the confusion in the case law does not lead district judges, less familiar with the intricacies of nonstatutory judicial review than Judge Friendly, to deny a hearing on the merits to some litigants who should receive it.

No claim is made, of course, that each of the cases in which sovereign immunity has been invoked reached an unjust result. Alternative grounds for dismissal were mentioned or were present in many of these cases; and it is likely that the government would have prevailed in most of the cases if the merits had been reached. But it cannot be asserted with confidence that *all* of the results were just; some meritorious claims may have been rejected out-of-hand by dismissals based on sovereign immunity grounds.

It is time to reassert the fundamental proposition stated in *United States* v. *Lee*, 106 U.S. 196, 220 (1882):

> "Courts of justice are established, not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . ."

B. *Provide Specific Relief in Cases Involving Public Land*

Sovereign immunity has played a large role in cases involving the use or disposition of land claimed by the United States. The Committee's recommendation is intended to provide a local judicial remedy in two related but distinct situations: (1) judicial review of administrative determinations involving public land questions; and (2) property disputes between the United States and private persons.

1. *Judicial review of administrative determinations in the public land field.* Unlike more recently created administrative agencies, the older administrative activity involved in the use or disposition of public lands is not subject, with rare exceptions, to specific statutory review provisions. Consequently, a litigant challenging an administrative determination in the public land field is required to seek "nonstatutory" review under the general law governing the federal judicial system. In order to avoid the sovereign immunity doctrine, the suit must be brought against the official rather than against the government itself by name. But even that may not suffice when the judgment sought would directly provide for the disposition of government property. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). A literal application of this prohibition would foreclose all suits against public land officials, a result that would be unjust as well as inconsistent with a long history of limited judicial review in the public land area. See, *e.g.*, *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582 (D.C. Cir. 1954); *Clackamas County* v. *McKay*, 219 F.2d 479 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955). The absence of statutory review provisions also has created pressure to view § 10 of the Administrative Procedure Act as a jurisdictional provision and as a consent to suit. *Adams* v. *Witmer*, 271 F.2d 29 (9th Cir. 1959). The result is a great deal of confusion. A recent study of "Administrative Procedures and the Public Lands," prepared for the Public Land Law Review Commission by a group of scholars headed by Professor McFarland of the University of Virginia, stated that:

> ". . . suits in the nature of review actions [against public land officials] often have been permitted. . . . When they are permitted notwithstanding, and when forbidden because of, the sovereign immunity doctrine is admittedly difficult if not impossible to determine on the basis of the court opinions. . . . [T]he precedents baffle lawyers, tempt government counsel, and feed the despair of commentators." [Pp. 187–88. Footnotes omitted. Footnote 279 adds that "Despite *Larson* . . . no pulbic land case of the traditional type has been decided by the Supreme Court on the basis of sovereign immunity."]

The study concludes that "a simple statutory affirmation of the right to court review would seem to be a dire necessity and should pose no threat to legitimate public land administration." (P. 305.) The report cautions that "because court review is severely limited at best," under the general law of judicial review codified in the Administrative Procedure Act, abolition of sovereign immunity will not be "disruptive, costly, and time consuming in operation. But it could operate to firm up administrative procedures, instill confidence in those who have or seek rights to develop public land resources, and afford at least a theoretical protection for the small operator who traditionally has difficulty in dealing with officialdom." (Pp. 305–06.)

Although the Public Land Law Review Commission will not submit its final report until mid-1970, there is every indication that the Commission will accept the recommendations of its study staff. The Committee's recommendation will effectuate this highly desirable reform.

2. *Property disputes between the United States and private persons.* Federal law does not contain any general provision authorizing quiet title suits involving land claimed by the United States. In the absence of such a provision, attempts to obtain specific relief against the federal officer in possession of disputed land have foundered on the sovereign immunity doctrine. *Malone* v. *Bowdoin,* 369 U.S. 643 (1962), discussed extensively at pp. 15–18, *supra,* invoking sovereign immunity to bar a suit to try title, denies specific relief to the private landowner, leaving him a damage remedy for an unconstitutional "taking" under the Tucker Act.

The Committee believes that specific relief (injunction or declaratory judgment) is appropriate in these land dispute cases. The uniqueness of land is a factor favoring specific relief and distinguishing this situation from other property situations (the coal involved in the *Larson* case had no unique or unusual qualities; hence money damages was a totally adequate remedy). The nonstatutory suit for specific relief may be brought in the district court where the land is located, 28 U.S.C. § 1391(e), providing the landowner with an easily accessible and inexpensive local forum (the Court of Claims has exclusive jurisdiction of the claim for money damages if the value of the property exceeds $10,000). The issues likely to be involved in these cases, a blend of state land law and federal statutory law, are peculiarly appropriate for judicial determination.

Moreover, the government should adhere to prescribed processes of decision-making in exercising, whether in form or substance, the power of eminent domain. In some situations, such as that involved in *Simons* v. *Vinson,* 394 F.2d 732 (5th Cir. 1968), in which sovereign immunity was held to bar a claim of accreted land formed along a river which divided land owned by the United States from that of the plaintiffs', eminent domain may be inapplicable because no public use could be shown—apparently the government's only purpose was to collect royalties from oil produced on the disputed land. In other cases, such as *Malone* itself or *Gardner* v. *Harris*, 391 F.2d 885 (5th Cir. 1968), where the disputed land was part of a larger parcel devoted to a public purpose, eminent domain is available if the land found to belong to the claimant is desired by the United States. Is it too much to ask that condemnation of private land be accomplished in accordance with the policies and procedures established by Congress, rather than by the unilateral decision of a government officer, perhaps a subordinate one, in claiming the land or taking possession of it?

A partial abolition of sovereign immunity would open the door to suits for injunctive or declaratory relief in land dispute cases, at least in situations where the plaintiff frames his complaint so as to meet federal-question requirements (enjoining what would otherwise be an unconstitutional taking of private property). See *White* v. *Sparkhill Realty Corp.*, 280 U.S. 500 (1930), stating that a suit to enjoin unconstitutional conduct comes within the federal-question jurisdiction but an ejectment complaint, "without anticipating possible defenses, would not present a case arising under the Constitution or a treaty or law of the United States." Because of jurisdictional problems (even suits stating a federal question would need to satisfy the $10,000 minimum jurisdictional amount of 28 U.S.C. § 1331) and because some procedural aspects of quiet title suits deserve special treatment, an amendment to the Judicial Code authorizing quiet title proceedings in federal district courts to resolve land disputes between the United States and private persons is probably desirable in addition to the recommendation proposed at this time.

The Committee has encountered little opposition to its view that federal courts should be authorized to resolve land disputes involving the United States. The McFarland report to the Public Land Law Review Commission, for example, stated that "There seems to be somewhat general agreement that there should be statutory provision for suits to try title. . . ." (P. 305.) There is gamesmanship involved in getting federal officials to take the initiative in bringing court suits—the only present method of circumventing sovereign immunity. Sometimes government lawyers are unwilling to take this step merely because they do not want to shoulder the plaintiff's burdens; the ability of the private claimant to initiate suit would remedy that problem. Remedial legislation on this subject has been drafted by the Department of Justice but has thus far not received priority on the department's legislative program.

C. *Allow the United States To Be Named as Defendant in Cases Challenging Government Action*

Actions challenging official conduct are intrinsically against the United States. Clarity is served by allowing the plaintiff to name the United States as a defendant in such actions. Part (1) of the recommendation withdraws the defense of sovereign immunity in actions not seeking monetary relief in which the legality of federal administrative action is challenged. The plaintiff is permitted but not required to name the United States a defendant.

Moreover, the recommendation provides that "judgment or decree may be entered against the United States whether or not the United States is named as a defendant" in an action of the type permitted by the recommendation. When the Attorney General or other authorized legal officers of the United States defend an officer or agency acting in his official capacity or under color of legal authority, the United States should be bound by the resulting judgment or decree to the extent that and in the manner that it would be if it had been named as a party.

Part (2) of the Committee's recommendation allows a nonstatutory review action to be brought "against the United States, the agency by its official title, or the appropriate officer." Insertion of this sentence in 5 U.S.C. § 703, dealing with the "form and venue of [review] proceedings makes it clear that the form and venue of existing statutory review proceedings is unaffected. Thus if a "special statutory review proceeding" provides for exclusive jurisdiction in a particular court, a form of proceeding, and special venue, such provisions must be complied with. Only if no special statutory review proceeding is applicable may a nonstatutory review proceeding be brought "against the United States, the agency by its official title, or the appropriate officer."

There are three reasons for allowing the United States to be named as defendant in nonstatutory review actions: (1) to avoid the frictional subtleties of the suit against the officer; (2) to eliminate the possibility that an otherwise meritorious claim could be defeated on the technicality that a wrong defendant was named; and (3) to insure that the resulting judgment is binding on the United States.

1. *Fictional character of the suit against the officer.* The suit

against the officer, challenging his official conduct, served a useful purpose as a device for circumventing the sovereign immunity doctrine. Once sovereign immunity is tamed, however, requiring the plaintiff to cast his suit in the form of a suit against the officer performs no useful function. The fictional character of the suit against the officer is merely misleading and deceptive. Everyone recognizes that the suit is in fact against the United States, or one of its agencies, and involves the legality of governmental action.[1]

2. *Technicalities of the law of parties defendant.* Requiring the plaintiff to sue an officer, when everyone recognizes that the action is against the United States, perpetuates some troublesome technicalities of the law of parties defendant. Even though Rule 25(d) of the Federal Rules of Civil Procedure provides that "When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name," courts occasionally dismiss because the wrong officer was named, other officers were not joined, or service of process was made on an agency rather than the officer. See, *e.g.*, *Congress of Racial Equality* v. *Commissioner*, 270 F.Supp. 537, 542 (D.Md. 1967) (action against the chairman of the Civil Service Commission dismissed because the other commissioners were indispensable parties) ; *Bell* v. *Groak*, 371 F.2d 202 (7th Cir. 1966) (service made on Commission rather than upon *each* commissioner). Allowing the plaintiff to sue the officer, the agency by name, or the United States should eliminate decisions on such technical procedural grounds. If the plaintiff names the United States as defendant, process would be served in accordance with Rule 4(d) (4) of the Federal Rules of Civil Procedure—by delivery to the United States attorney for the district in which the action is brought, with a copy mailed to the Attorney General, and "in any action attacking the validity of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency."

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[1] The essentially nonpersonal nature of the nonstatutory review action is recognized explicitly in connection with the "substitution" of successors where a defendant official "sued in his official capacity" dies or resigns. At the trial level since 1961 "his successor is automatically substituted as a party" and "he may be described as a party by his official title rather than by name." Rule 25(d), Federal Rules of Civil Procedure ; and see also the similar Rules 48(a) and (4) of the Supreme Court Rules and Rule 43(c) of the Federal Rules of Appellate Procedure for the Courts of Appeals. Although the rule speaks in terms of public officials sued in their "official capacity," the Notes of the Advisory Committee on Rules concerning the basic 1961 Rule describe it as one applicable "to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof," and state that it is designed to "encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action."

3. *Binding effect of judgments.* The theory of the officer's suit is that the officer, by acting unconstitutionally or in excess of his authority, is no longer acting in his official capacity, and hence may be enjoined in his personal capacity. This fiction allowed circumvention of sovereign immunity, but raised questions concerning the binding effect of the judgment on the United States, which was not and could not be made a party. A long line of cases states the rule that the United States is not bound by a judgment in an unconsented *in personam* action against one of its officers. See *Carr* v. *United States,* 98 U.S. 433 (1878); *Hussey* v. *United States,* 222 U.S. 88 (1911); *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 402–03 (1940); but cf. *United States* v. *Candelaria,* 271 U.S. 432, 444 (1926) (United States bound by a judgment when its lawyers controlled the litigation). Moreover, sovereign immunity is an objection that is available on collateral attack even if government lawyers did not raise it in an earlier proceeding. *United States* v. *United States Fidelity & Guarantee Co.,* 309 U.S. 506 (1940). Government counsel now ordinarily defend even personal actions against federal officers arising out of their official duties. It is unconscionable that the United States not be precluded by a judgment in a litigation in which its interests are involved and in which it has controlled the defense. The recommendation, by providing that "a judgment or decree may be entered against the United States whether or not the United States has been named a defendant" draws on general principles of res judicata and insures that the United States will be bound by the judgment when it has controlled the defense in a suit against an officer.

D. *Law Other Than Sovereign Immunity Unchanged*

The Committee's recommendation, after forthrightly abolishing sovereign immunity as a defense in nonstatutory review actions, provides that

> "Noting herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; . . . ."

This important protective language insures that the abolition of sovereign immunity will not result in undue judicial interference with governmental operations or a flood of burdensome litigation. Grounds for dismissal or denial of relief under present law include but are not limited to:

(1) The plaintiff's lack of standing (*e.g., Perkins* v. *Lukens*

Steel Co., 310 U.S. 113 (1940); *Pennsylvania R. Co.* v. *Dillion*, 335 F.2d 292 (D.C. Cir. 1964)).

(2) The absence of a matured controversy (*e.g.*, *International Longshoremen's Union* v. *Boyd*, 347 U.S. 222 (1954)).

(3) The availability of an alternative remedy in another court (*e.g.*, *American President Lines, Ltd.* v. *Federal Maritime Board*, 235 F.2d 18 (D.C. Cir. 1956)).

(4) The express or implied statutory preclusion of judicial review (*e.g.*, *Schilling* v. *Rogers*, 363 U.S. 666 (1960) (implied preclusion); *Barefield* v. *Byrd*, 320 F.2d 455 (5th Cir. 1963) (express preclusion)).

(5) The commission of the matter by law to the defendant's discretion (*e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958)).

(6) The privileged nature of the defendant's conduct (*e.g.*, *Barr* v. *Matteo*, 360 U.S. 564 (1959); *United States* v. *Reynolds*, 345 U.S. 1 (1953)).

(7) The plaintiff's failure to exhaust his administrative remedies (*e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)).

(8) The discretionary authority of a court to refuse relief on equitable grounds (*e.g.*, *Morrison* v. *Work*, 266 U.S. 481, 490 (1925)).

As Professor Byse has commented:

> "None of these principles is precise or self-executing, and it is not difficult to criticize the manner in which they have been applied in some instances. But unlike the sovereign immunity doctrine, they require or at least tend to require the court to direct attention to the considerations that are relevant to the question whether the action should be reviewed.[157] Rather than being able to rely upon the conceptualism of the *Larson* case or upon other 'empty fictions which have thus far largely controlled the application of the sovereign immunity doctrine in suits against government officers,' the court would be forced to consider—and hopefully to

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[157] "If, for example, the *Larson* case . . . had been decided under [a proposed statute abolishing sovereign immunity], the action could not have been dismissed on the ground that it was against the United States, or that the United States was an indispensable party. But the action might have been dismissed on the ground (1) that the plaintiff had an adequate legal remedy for money damages under the Tucker Act, or (2) that to allow suits for specific performance of contracts that are part of a national program to dispose of surplus war goods would constitute an unwarranted disruption of the government's sales program, or (3) that the statute in question gave the War Assets Administrator authority to make erroneous as well as correct determinations. Deciding the *Larson* case on any of these grounds would require the court to direct attention precisely to the considerations which are relevant to the issue whether the administrative action should be reviewed by the court. If the court should conclude (1) that the plaintiff did not have adequate legal remedy and (2) that specific performance of the contract would not unduly interfere with the program to dispose of surplus war supplies and (3) that the Administrator's authority did not extend to making erroneous decisions, I cannot see that any sound policy would be served by refusal to adjudicate the plaintiff's contentions."

> articulate in its opinion—precisely why relief should be granted or denied. Such a process not only should result in more intelligent decisions but should provide the profession with sounder bases for prediction and constructive criticism than are possible in the present morass.
>
> "Although I cannot pretend to an encyclopedic knowledge of governmental regulation or to the prescience needed to foretell judicial reaction to ingenious efforts of resourceful counsel to extend any statute to its utmost, I am confident that the various doctrines and principles that govern the availability of judicial review are sufficiently comprehensive and flexible to prevent an undue increase in the availability of judicial review and to avoid improper judicial interference with federal regulatory action. . . ." Byse, *Proposed Reforms in "Nonstatutory" Judicial Review*, 75 Harv. L. Rev. 1479, 1529–30 (1962).

Special doctrines favoring the United States as a plaintiff are unaffected by the Committee's recommendation. The exemption of the United States from statutes of limitations is not based on sovereign immunity but on the separate ground that the public interest should not suffer because of the negligence of public officers. *United States* v. *Summerlin*, 310 U.S. 414 (1940). Moreover, the Committee's recommendation is applicable to situations in which the action is against the United States, not to those in which the United States is a plaintiff.

Nor does the Committee's recommendation affect the longstanding immunity of the United States from garnishment process. *FHA* v. *Burr*, 309 U.S. 242 (1940). In these cases, in which an employee of the United States allegedly owes money to a creditor, who attempts by means of state garnishment process to reach wages due the employee from the United States, the action does not involve a claim that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." Moreover, the action seeks money relief.

Government lawyers who have expressed opposition to an abolition of sovereign immunity fear that two harmful consequences may result: (1) undue judicial interference with governmental programs; and (2) a flood of burdensome litigation causing expense and inconvenience to the government. Although complete assurance on each of these matters is impossible, the Committee has reasons to believe that these *in terrorem* consequences will not result from an adoption of its proposal.

1. *Undue judicial interference with governmental programs?* It must be borne in the mind that the sovereign immunity doctrine became established about one hundred years ago, long before the modern law of judicial review had developed. The courts at that time assumed that they must choose between performing

executive tasks and refusing review; it was understandable that they took the latter course. With the development in the twentieth century of a sophisticated body of law governing the availability, scope and limits of judicial review, this choice is no longer presented. American experience amply demonstrates that a *limited* judicial review of governmental actions produces fairer administrative procedures, sounder substantive results, and better government.

The essential and sound policy underlying sovereign immunity—that courts should not engage in indiscriminate interference with governmental programs—is *not* abandoned merely because an artificial and outmoded doctrine is abolished. The same basic policy is inherent in the body of law that governs the availability and scope of judicial review. The doctrine of sovereign immunity is unnecessary to prevent courts from (a) entering fields which the Constitution or Congress has delegated to the executive, and (b) displacing executive or administrative judgment.

The Committee's recommendation is an amendment to the Administrative Procedure Act; and its clear language retains the existing limitations on the availability of judicial review. Section 10 of the APA, now 5 U.S.C. § 701, provides that "This chapter applies . . . except to the extent that— (a) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Sovereign immunity and unreviewability are two separate ideas; and unreviewability is clearly retained. Thus it is fanciful to suppose that abolition of sovereign immunity will allow the courts to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action. Courts are not unaware of their capabilities and limits; much of the law of unreviewability consists of marking out areas in which legislative action or traditional practice indicate that courts are unqualified or that issues are inappropriate for judicial determination.

Several recent cases provide illustrations. In *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir. 1967), a serviceman sought to enjoin the Secretary of Defense from ordering him to Vietnam, claiming that American military action there was unconstitutional and illegal. In dismissing the action the court stated:

> "It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and dis-

> position of military power; these matters are plainly the exclusive province of Congress and the Executive." 373 F.2d at 665–66.

The sovereign immunity doctrine, briefly mentioned as an alternative ground, was superfluous; the result would be the same in its absence. Similarly, the closing of a military facility (*Armstrong* v. *United States*, 354 F.2d 648 (9th Cir. 1965)), the shift in location of a customs office (*Los Angeles Custom and Freight Brokers Ass'n* v. *Johnson*, 277 F.Supp. 525 (C.D.Calif. 1967)), the discontinuance of a post office (*Sergeant* v. *Fudge*, 238 F.2d 916 (6th Cir. 1956)), and the like, are unreviewable because committed to agency discretion or otherwise inappropriate for judicial determination.

Similarly, abolition of sovereign immunity will not expose governmental programs to indiscriminate judicial interference by injunction. The result in *Dugan* v. *Rank*, 372 U.S. 609 (1963), discussed supra at pp. 19–20, would be unaffected by the Committee proposal. The Court in *Dugan* interpreted the statutes under which the reclamation project was proceeding as authorizing the seizure of private water rights and as confining the plaintiff to his claim for monetary relief under the Tucker Act. Monetary relief, the Court held, was intended to be the exclusive remedy.

Where Congress has not expressly or impliedly precluded specific relief, injunctive relief nevertheless will be denied if harm to public interests will result from such relief. The Committee's proposal does not affect the longstanding tradition that an equity court has to balance the interests of the parties in deciding what kind of relief is appropriate:

> "The court, in its discretion, may refuse . . . to give a remedy which would work public injury or embarrassment . . . just as in sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360 (1933).

See also § 10(d) of the APA, now 5 U.S.C. § 705.

It is true that considerable discretion is inescapably vested in the judiciary, and the possibility of occasional error remains. But this is an inevitable concomitant of the administration of any system by human beings. This risk must be weighed against the injustices and uncertainties resulting from the sovereign immunity doctrine. (Of course, error is possible even under the sovereign immunity doctrine; lower courts in *Dugan* v. *Rank*, 372 U.S. 609 (1963), interfered with the administration of the Central Valley water project for several years, until reversed by the Supreme Court.) If the fear of improper judicial interference proves warranted, which seems unlikely, it could be met by a provision restricting temporary or interlocutory relief, pending a decision on the merits, in those situations in which caution is most warranted: when the action seeks (a) to compel the payment of money by the United States, (b) to secure the possession or enjoyment of property in which the United States is admitted or found to have a legal or equitable interest, or (c) to require action to be taken on behalf of the United States which would involve the expenditure of public funds.

Finally, the argument that abolition of sovereign immunity would allow judges to substitute their judgment for that of administrators overlooks the established limits on the scope of judicial review. Section 10(e) of the APA, now 5 U.S.C. § 706, limits review to such questions as constitutionality, statutory authority, proper procedure, abuse of discretion, and findings supported by substantial evidence. The scope of review in a case formerly kept out of court by sovereign immunity will be the same as the scope of review in a case that has always been reviewable. Substitution of judgment, de novo consideration, and the like, are not permitted.

The Committee considered but rejected proposals that attempted to state considerations governing the grant of specific relief. The factors involved are so numerous and their application so dependent upon the circumstances of individual cases that the attempt to spell them out is an exceedingly difficult task. It is, moreover, a hazardous one, since any attempt to restate a complex body of law creates problems while attempting to solve them. Language suggesting that the law of judicial review is being changed in one direction or another is almost impossible to avoid; and any partial restatement of relevant factors creates negative implications with respect to factors or doctrines that are omitted. Thus the Committee concluded that it was wiser to withdraw the defense of sovereign immunity in certain situations in which its application is inappropriate, leaving all other law unrestated and unchanged.

2. *Inconvenience to the government from burdensome litigation?* Some government lawyers, defending the sovereign immunity doctrine, assert that it prevents a flood of litigation from overwhelming federal courts and government legal staffs. They point to the large number of "crackpot" suits which are filed against the United States and its agencies; and the value of sovereign immunity as a device for getting rid of these cases

at the threshold, without the inconvenience and expense of a defense on the merits. "Crackpot" suits, however, have deficiencies other than that they are directed against the United States or its officers. In nearly every such case there will be other grounds for dismissal on the pleadings (most often because the plaintiff lacks standing, because the issue is inappropriate for judicial determination, because the action is committed to agency discretion or precluded from review, or because the complaint fails to state a claim for relief). In nearly every case government lawyers assert a battery of defenses and objections, of which sovereign immunity is only one. If no other defense or objection exists, one suspects that the suit is not properly classified as a "crank" suit and that consideration of the merits is desirable.

The "floodgates" argument is always a difficult one to rebut in advance, but fears of this kind tend to be exaggerated. The doctrine of sovereign immunity is so riddled with exceptions that a large increase in the volume of litigation seems unlikely. The experience of those agencies that are now fully subject to judicial review under statutory review provisions suggests that the level of litigation is not crippling or burdensome, and that judicial review has many advantages, even from the agency's point of view. The heavy expense of litigation also serves as a pragmatic limit on the volume of cases. Other limiting doctrines, already discussed, will allow a threshhold disposition of unmeritorious cases. In the final analysis, if some additional cases do reach the merits because of the curtailment of sovereign immunity, the additional burden on government lawyers must be justified on the same basis as judicial review in general—the desirability of a judicial determination of the legality of official action.

E. *Retain Present Exclusions on the Availability of Monetary or Alternative Relief*

The Committee's recommendation is phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes, such as the Court of Claims Act, 28 U.S.C. § 1491, the Tucker Act, 28 U.S.C. § 1346(a)(2), or the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401, 2402, 2411, 2412, 2671–80, in which Congress has conditionally consented to suit. While this result would probably have been reached by the preservation of all other "legal or equitable grounds[s]" for dismissal, which include the designation by Congress of an exclusive remedy or method of review, clause (2) of the final sentence of part (1) of the recommendation is intended to prevent any question on this matter from arising. It states unequivocally that

> "Noting herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

As the earlier discussion has indicated, the purpose of the Committee's recommendation is to provide nonstatutory review in some situations in which the doctrine of sovereign immunity now stands in the way. The creation of new substantive damage claims is not within the sphere of our concern; only a latitudinarian view of "judicial review" would consider monetary relief against the United States, primarily designed to compensate for harms done, as part of judicial review of administrative action, which is the subject of § 10 of the APA. However that may be, the language of our proposal, which is applicable in terms only to actions "seeking relief other than money damages," indicates that sovereign immunity remains as a defense to actions seeking monetary relief. Existing law governing money damages in tort and contract actions is left unchanged. Thus the exceptions from liability contained in the Federal Tort Claims Act, 28 U.S.C. § 2680, such as the exclusion of most intentional torts and activities involving "a discretionary function," remain unaffected by the Committee's proposal.

Similarly, in situations in which the statute consenting to monetary relief expressly or impliedly precludes an alternative remedy, such as the Court of Claims Act, 28 U.S.C. § 1491, and the Tucker Act, 28 U.S.C. § 1346(a)(2), suits for specific relief would continue to be barred, as those statutes by expressly consenting to certain actions for money judgments impliedly prohibit actions seeking other relief. Special statutory remedies having the same character, such as those dealing with Indian claims, patent infringement, water rights, and the like retain the same preclusive effect on other remedies that they have now. Similarly, statutory provisions which prohibit injunctive or declaratory relief in certain situations continue to be effective where applicable (*e.g.*, federal tax cases, 26 U.S.C. § 7421 and 28 U.S.C. § 773b).

On the other hand, the language of the recommendation should not be taken as *withdrawing* alternative remedies where they now exist. No new authority is conferred in situations dealt with by statutes granting consent to suit; but nothing is taken away. Presumably there are situations now in which specific relief can be obtained even though monetary relief for the claim involved is not authorized by a statute consenting to suit; an example might be a suit to enjoin a federal officer from engaging in an intentional tort, a situation in which the damage remedy against the United States is excluded by the Tort Claims Act, but without affecting the availability of specific relief.

IV. OTHER NEEDED REFORMS

The present recommendation is devoted to sovereign immunity in suits for specific relief in federal courts, but there are related reforms that are needed in order to realize the full benefits of withdrawing sovereign immunity as a defense in actions challenging federal administrative behavior and seeking relief other than money damages.

A. *Gaps in Tucker and Tort Claims Acts*

There are several situations in which neither monetary nor specific relief can now be obtained and the plaintiff has no judicial remedy at all, even though the matter is otherwise appropriate for judicial consideration. These cases come about mainly because of gaps in the Tucker and Tort Claims Acts, and also because of the lack of full coordination between these two legislative systems. Two situations in which monetary relief should probably be expanded are: (1) where monetary relief cannot be had in the Court of Claims or under the Tucker Act because the claim is quasi-contractual or restitutionary in character (contract implied in law rather than contract implied in fact); and (2) where tort damages cannot be recovered under the Federal Tort Claims Act because of the exceptions—especially that excluding most intentional torts—contained in that enactment. The quasi-contract problem remains a real one in theory, although the Court of Claims has been adept at circumventing it by holding in case after case that the particular contract is "implied in fact." There is no way around the tort-damage problem except by amendment of the Federal Tort Claims Act. Reconsideration of the question of when the United States should be liable for the torts of its officers is long overdue; in the process it may be desirable to clarify inconsistent interpretations of other aspects of the Tort Claims Act.

The relation of these matters to sovereign immunity is readily apparent. So long as there are unjustified gaps in the availability of monetary compensation, there will be pressure to grant specific relief, even in instances where monetary relief is clearly preferable. There will be, too, substantial risk to the development of an orderly and coherent body of law. For instance, there is no longer any justification at all for excluding contracts "implied in law" from the Tucker Act. There are tendencies, flowing from that exclusion, to push such claims under the Tort Claims Act or to expand the concept of contracts "implied in fact". There may also be injunction suits brought where the claimant would rather have the money, simply because no monetary relief is available. Other examples come from some of the exceptions to the Tort Claims Act which tend to put pressure on the concept of what is a "taking" redressable under the Tucker Act. For Congress to be in a position to make an intelligent choice among the possibilities of monetary compensation, specific relief, or both, these statutory exclusions from the Tucker and Tort Claims Acts should be reviewed for current soundness.

B. *Subject Matter Jurisdiction of Federal District Courts*

The Committee's recommendation does not vest subject matter jurisdiction on federal district courts in any situation in which it does not now exist; it merely provides that certain actions shall not be dismissed, or relief denied, solely on sovereign immunity grounds. This leaves the possibility that some actions for specific relief could not be brought either because the plaintiff's complaint does not arise under federal law or because, even though a federal question is stated, the case must come within the general federal question provision of 28 U.S.C. § 1331 and the amount in controversy does not exceed $10,000. An example of the former kind is *Malone* v. *Bowdoin,* 369 U.S. 643 (1962), which was an ejectment action against a federal officer. In that case, which was originally brought in a state court, federal jurisdiction rested upon the removal statutes, but it is doubtful that the case could have been brought originally in a federal district court since the plaintiff's claim rested on state law. The quiet title statute, discussed below, would remedy this deficiency. The second problem, that of jurisdictional amount in certain federal-question cases, would be solved by the enactment of Recommendation 7 of the Administrative Conference, adopted December 12, 1968, providing for the elimination of the jurisdictional-amount requirement in judicial review actions.

C. *Quiet Title Statute*

Regardless of whether or not the sovereign immunity doctrine is abolished, a special statute authorizing suits to quiet title against the United States is desirable. Subject matter jurisdiction of federal district courts, as indicated earlier (see also p. 33, *supra*), will be doubtful in some cases without such an enactment. Moreover, some procedural aspects of land dispute litigation involving the United States deserve special treatment (*e.g.*, questions of interlocutory relief, jury trial, multiple parties, relation to eminent domain). The Committee on Judicial Review hopes to report on this matter at a later time.

D. *Service of Process and Venue Problems*

1. *Service of process and parties defendant.* Rule 4(d)(4) governs service of process upon the United States. It provides that process must be served by delivery of a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. In addition, a copy of the summons and complaint must be sent by registered or certified mail to the Attorney General of the United States in Washington, D.C. Failure to notify the Attorney General has been held to require dismissal (*Smith* v. *McNamara*, 395 F.2d 896 (10th Cir. 1968); *Messenger* v. *United States*, 231 F.2d 328 (2d Cir. 1956); *Lemmon* v. *Social Security Administration*, 20 F.R.D. 215 (E.D. S.C. 1957), although a few decisions prior to the 1966 amendment of Rule 15(c) permit the defect to be cured when dismissal would mean the barring of plaintiff's claim because of the running of the statute of limitation. *Rollins* v. *United States*, 286 F.2d 761, 768 (9th Cir. 1961); *Fugle* v. *United States*, 157 F.Supp. 81 (D.Mont. 1957); the effect of the 1966 amendment to Rule 15(c) is discussed, *infra*. Moreover, in an action attacking the validity of an order of an officer or agency of the United States, if the officer or agency has not been made a party to the action, a copy of the summons and complaint also must be sent by registered or certified mail to the relevant federal officer or agency.

Rule 4(d)(5), which supersedes prior inconsistent statutes, must be followed to effect service of process on an officer or agency of the United States, A copy of the summons and complaint must be delivered to the officer or agency being sued and service must be made on the United States itself as provided for in Rule 4(d)(4). If the federal agency involved is a corporation, Rule 4(d)(5) requires that service also be made on the agent of the corporation as provided in Rule 4(d)(3), in addition to service upon the United States under Rule 4(d)(4).

Section 1391(e) of Title 28, added to the Judicial Code in 1962, dispenses with the requirement of personal service in actions in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority. In cases of this type, delivery of the summons and complaint may be by certified mail rather than personal delivery if the officer or agency to be served is beyond the territorial limits of the district in which the action is brought. Other aspects of Rule 4, however, continue to be applicable. Thus in any such case service must be made upon the United States by notifying the Attorney General as provided in Rule 4(d) (4).

The size and complexity of the federal government, coupled with the intricate and technical law concerning official capacity, parties defendant, and the like, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the wrong defendant was named or served. See the full discussion in Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action*, 77 Harv. L. Rev. 40 (1963); Davis, *Suing the Government By Falsely Pretending To Sue An Officer*, 29 U. Chi. L. Rev. 435 (1962). The unsatisfactory state of the law has been recognized for some time and three attempts have now been made to cure the deficiencies:

First, the Mandamus and Venue Act of 1962, 28 U.S.C §§ 1361, 1391(e), circumvents the formerly troublesome requirement that superior officers be joined as parties defendant by allowing nationwide substituted service on the superior officer. Although the superior officer still must be joined when the law of parties considers him indispensable, the requirement can now be met by mailing a copy of the summons and complaint to the superior officer, thus allowing actions to proceed other than at the home base of the superior officer (usually the District of Columbia). The legislative history of the provision is to the effect that the law should not be tailored for the convenience of the government, but rather there should be "readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government." The Congress noted that the law of parties defendant was not altogether clear either in logic or consistency and that such actions "are in essense against the United States." 1962 U.S. Cong. & Adm. News 2784–2787. Hence Congress seems committed to providing a path through the procedural maze.

Second, Rule 25(d) of the Federal Rules of Civil Procedure was amended in 1961 to provide for the automatic substitution of successors in office. This broad remedial provision is applicable to any action in which a "public officer" is sued in his "official capacity." The rule also states that "any misnomer not affecting the substantial rights of the parties shall be disregarded" and that the officer may be "described as a party by his official title rather than by name."

Third, Rule 15(c) of the Federal Rules of Civil Procedure was amended in 1966 to make clear that an amendment adding or changing parties defendant in actions "with respect to the United States or any agency or officer thereof" relates back to the date of the original pleading whenever process was delivered or mailed "to the United States Attorney or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." This sentence allows a plaintiff who is in doubt concerning the identity of the proper officer or agency to commence his action by serving process on the United States Attorney, or the Attorney General, or an agency or officer who would have been a proper defendant if named. Difficulty of ascertaining the proper defendant is often understandable considering the vast array of government officers and agencies and technicalities that govern parties defendant. Under Rule 15(c) the plaintiff who has served any one of the persons designated may correct his pleading when the United States moves to dismiss on grounds that a particular officer was not named or joined as a defendant. Cases holding to the contrary either were decided prior to the 1966 amendment of Rule 15(c) or they are erroneous. In *Smith* v. *McNamara,* 395 F.2d 896 (10th Cir. 1968), for example, dismissing an action because the proper officer was not served, the court's attention was not directed to the amendment to Rule 15(c). Dismissal is proper under the amended Rules only when the plaintiff fails to amend his pleading and to complete service on the proper officer within a reasonable time after the defect is raised.

A liberal application of the three remedial provisions discussed above should prevent dismissals based on technicalities of the law of officers. The Congress and the draftsmen of the Federal Rules have indicated with great clarity that actions challenging federal conduct should be decided on the merits rather than on narrow procedural grounds. Although the law of parties defendant remains unchanged, the consequences of not selecting or serving the proper defendant at the outset, or failing to substitute a successor in office, have been ameliorated. The Department of Justice should take full note of these recent changes and inform United States Attorneys of their import.

If the amendments to Rules 15(c) and 25(d), coupled with the extraterritorial service of process provision of 28 U.S.C. § 1391(e), do not remedy the unsatisfactory case law relating to service of process and parties defendant in suits against federal officers, further reform will be required. One possibility, eliminating all technical problems, would be to provide for service of process upon the United States Attorney of the district in which the action is brought, without more, thus imposing on the Department of Justice the burden of identifying the federal officer or agency that should be notified and the manner in which such notice is given. As long as the Government through its lawyers has adequate notice of the suit, dismissal because of technical defects about parties defendant is inappropriate.

2. *Venue.* The venue part of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e), provides for venue of the type of action that the Committee's recommendation is concerned with. 28 U.S.C. § 1391(e) allows actions against federal officers or agencies, acting in their official capacity or under color of legal authority, to be brought in the district in which "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action." This provision does not appear to be applicable to suits against the United States. Although there is a special venue provision dealing with actions in which the United States is a defendant, that provision, 28 U.S.C. § 1402, applies only to three kinds of damage actions brought under 28 U.S.C. § 1346 (Tucker Act cases, Federal Tort Claims Act cases, and federal tax cases). And the general venue provision applicable to federal-question cases, 28 U.S.C. § 1391 (b), is difficult to apply since it allows the action to be brought only in the district where "all defendants reside, or in which the claim arose." If the United States, like a corporation, resides where it is doing business, *i.e.*, everywhere, the general venue provision of § 1391(b) is too broad since suit could be brought on any claim in any judicial district chosen by the plaintiff; on the other hand, if, as seems more likely, a residence cannot be attributed to the United States, the action may be brought only where the cause of action arose, a much narrower venue choice than provided by 28 U.S.C. § 1391(e), which was drafted with the situation of the suit against the officer in mind.

The Committee's recommendation, insofar as it permits the plaintiff to name the United States as defendant, is unlikely to be fully effective unless the venue provisions of 28 U.S.C. § 1391 (e) are amended to include actions of the same type in which the United States is the named defendant. Until that happens, the suit against the officer, with the ample venue choice given by 28 U.S.C. § 1391(e), is likely to remain the manner in which actions are cast.

If 28 U.S.C. § 1391 is amended to include actions in which the United States is named defendant, two other changes in the section would be desirable. *First,* § 1391(e) has been held inapplicable to territories such as the Canal Zone (*Leber* v. *Canal Zone Central Labor Union*, 383 F.2d 110 (5th Cir. 1967)), an oversight that should be remedied. *Second,* § 1391(e) prohibits the joinder of private persons or state officials as defendants since it is expressly limited to cases "in which *each* defendant is an officer or employee of the United States or an agency thereof." (Emphasis added.) *Town of East Haven* v. *Eastern Airlines,* 282 F.Supp. 507 (D.Conn. 1968); *Chase Savings & Loan Ass'n* v. *Federal Home Loan Bank Board,* 269 F.Supp. 965 (E.D.Pa. 1967). There is no functional justification for this limitation, which prevents relief in some situations in which the federal courts can make a special contribution. In many public land controversies, for example, three parties are involved—the official, a successful applicant, and an unsuccessful one. Effective relief cannot be obtained in an action in which the United States or its officer is not involved; but if the government is named as defendant, § 1391(e) prevents the joinder of the other private person (who cannot be joined as a plaintiff because his interest is adverse to that of the plaintiff). Another common type of situation in which the limitation is troublesome is when specific relief is sought against federal and state officers who are cooperating in a regulatory or enforcement program. 28 U.S.C. § 1391(e) should be amended so as to allow for effective relief and binding judgments in multiple party situations.

CONCLUSION

Compared to other contemporary social problems—race, poverty, urban decay, and the like—sovereign immunity is relatively trivial and unimportant. Yet it is a subject on which the Administrative Conference of the United States may make a modest contribution in rationalizing a complex and intricate specialty of federal law. The Committee on Judicial Review, believing that the doctrine of sovereign immunity has outlived its usefulness, urges the Conference, by adopting the Committee's recommendation, to broaden the opportunities of citizens to obtain judicial review of federal administrative actions.

RECOMMENDATION NO. 10

JUDICIAL ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

RECOMMENDATION

The orders of most major independent regulatory agencies normally become enforceable automatically unless challenged in court. The statutory requirement that an order of the NLRB can be made effective only by affirmative action to obtain judicial confirmation of its terms, even when its validity is wholly uncontested, is contrary to efficient law enforcement. The Administrative Conference of 1961–62 urged that NLRB orders be treated, for purposes of judicial review, like those of the other major independent administrative agencies. That recommendation remains as sound today as when it was first made. The present practice burdens the courts with unnecessary proceedings whose only product is delay rather than added protection against ill-founded action. In the absence of any challenge after due notice to the parties, NLRB orders should be enforceable by the U.S. Courts of Appeals without further intermediate steps.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 10

Unlike the orders of other Federal agencies included in the Committee's study, orders of the National Labor Relations Board are not self-enforcing. Rather, the Board must seek an order of enforcement from a Court of Appeals. This involves a period of waiting to see if a party to the case intends to seek judicial review of the order. It serves no useful purpose but operates to delay the effectiveness of NLRB orders and to impose unnecessary costs on the Board.

Orders of other agencies, as detailed herein, are effective unless set aside upon court review. No reason for continuation of this special treatment of NLRB orders has been discovered, and it is the conclusion of the Committee that these orders should be accorded the same finality given to the orders of other agencies.

The problem was considered in detail by the 1961–62 Administrative Conference, and that Conference recommended a procedure which would result in automatic judicial enforcement of NLRB orders if no party promptly challenges the order. The procedure would have afforded a period of 45 days within which to challenge the order. If, after due notice to all parties, no such challenge were forthcoming, the order would be enforced without further proceedings by the entry of an appropriate court decree. (Recommendation No. 18 of the 1961–62 Conference.)

This relatively non-controversial recommendation has not been implemented, apparently because it has been linked with other more controversial proposals to amend the National Labor Relations Act. The Committee believes that the recommendation is sound. The supporting reasons are set forth in the report which accompanied the 1962 recommendation, attached hereto as Appendix II. Appendix I is a current review of the subject.

SCOPE OF MEMORANDUM

Professor Jaffe has noted that problems concerning the enforcement of administrative regulations and orders

> "arise in large measure from the division of the enforcement function between agencies and the courts. . . . [The most common sanctions for

> disregard of administrative orders] cannot be imposed without at some point running the gauntlet of judicial scrutiny, however much the degree of scrutiny may vary in different situations. When the process is the ultimate one of execution, it is customary for judicial action to precede execution." Jaffe, *Judicial Control of Administrative Action* (1965) at 261.

He has also pointed out that there are

> "two stages in which the character of a remedy may be brought into question. Labor Board orders, for example, are idefinitely subject to court review and cannot be enforced unless and until a court, on motion of the Board, enters its own enforcing decree. Other orders become final, usually after sixty days, if the respondent has not sought review within that period." *Id.*, at 266.

Enforcement statutes for orders of the various administrative agencies and executive departments listed in the discussion section of this memorandum have been examined in an attempt to discover which agencies, in addition to the NLRB, issue orders which are not self-enforcing. Assuming absence of voluntary compliance with a given order, the NLRB must, in practice, take the initiative to subject its own orders to judicial review in order to insure their enforcement. Other agencies, *e.g.*, the FTC, may rely upon an aggrieved party being required to institute review proceedings on penalty of having the order in question become final without judicial review.

No attempt has been made to go beyond the statutes themselves into the rules of practice of any agency. Nor has any attempt been made to examine the legislative history of any of the various statutory provisions. The review statutes have been classified for descriptive purposes into four general categories.

CONCLUSION

Of all of the agencies examined, only the NLRB issues non-self-enforcing orders. Orders of the other agencies, if reviewable, become final within a specified time unless a petition for review is filed by a party aggrieved by the agency's action.

DISCUSSION

The review procedures may be grouped into four general categories:

1. *NLRB Orders*. 29 U.S.C. § 160(e) provides in part:

> "The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States within any circuit or district, respectively, wherein the unfair labor practice in ques-

> tion occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Section 160(f) provides:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The operation of the review procedure established by these provisions is fully discussed in Recommendation 18 of the 1962 Administrative Conference. Here it is sufficient to say that these provisions differ in two important respects from the other statutory patterns for judicial review discussed below. *First,* section 160(f) provides for no time limit within which an aggrieved party must file a petition for review before the order in question becomes enforceable. *Second*, the agency itself is given the power to initiate action before the reviewing court. The effect of these provisions is clearly to deprive all NLRB orders of enforceability until passed upon by a court of appeals.

2. *Other Orders Reviewed by Courts of Appeals.* A second review procedure (and the most frequently encountered among those examined) is illustrated by the Federal Trade Commission statute. 15 U.S.C § 45(c) provides:

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, part-

> nership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . Upon such filing of the petition the court shall have jurisdiction of the proceeding, and of the question determined therein concurrently with the Commission until the filing of the record and shall have the power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28."

15 U.S.C. § 21(c) is another review provision essentially similar to section 45(c) and governs Robinson-Patman Act cases. Section 45(g) specifically provides that FTC orders become final upon the expiration of certain periods of time following the entry of the order, action by a court of appeals, or filing of a petition for certiorari, or immediately upon denial of a petition for certiorari.

Other agencies whose orders are reviewed under essentially similar provisions, becoming final after sixty days unless a petition for review is filed are, with the appropriate citation:

(1) Atomic Energy Commission (28 U.S.C. § 2342; 42 U.S.C. § 2239(b)).

(2) National Transportation Board (49 U.S.C. § 1468 (a)). A special provision, 49 U.S.C. § 1485(e), expressly imposes a duty to observe and comply with orders while they are in effect on the parties at whom they are directed. In most other cases this duty is implicit but is not expressly set out.

(3) Federal Communications Commission (47 U.S.C. § 402(a); 28 U.S.C. § 2341 et seq.).

(4) Federal Power Commission (15 U.S.C. § 717r(b); 15 U.S.C. § 8251).

(5) Securities and Exchange Commission (15 U.S.C. § 77i(a).

(6) Subversive Activities Control Board (50 U.S.C. § 793).

(7) Department of Agriculture (certain orders) (7 U.S.C. § 346a(i); 28 U.S.C. § 2341 et seq.).

(8) Department of Health, Education, and Welfare (certain orders) (21 U.S.C. §§ 348(g), 355(h); 15 U.S.C. § 1262(a)(2)(B)).

(9) Department of Justice (certain orders) (22 U.S.C. § 1631g(f)).

In other cases the petition must be filed in a court of appeals within thirty days,

(1) Federal Coal Mine Safety Board of Review orders under 3 U.S.C. § 478(a) and,

(2) Department of Agriculture orders under 7 U.S.C. § 194(a),

or in a court of appeals within ninety days,

(1) Department of Defense orders under 33 U.S.C. § 505 and,

(2) Department of Health, Education and Welfare orders under 21 U.S.C. § 371(f).

3. *Orders Reviewed By Other Courts According to Special Statutory Provisions in Each Case.* The following agencies issue certain orders which are reviewed according to particular procedures set out in the Code section cited. In no case, however, is an agency required to seek judicial review of its own order, as in NLRB cases:

(1) Interstate Commerce Commission (in the district courts), 28 U.S.C. § 1336(a);

(2) Civil Service Commission (in the district courts within thirty days), 5 U.S.C. § 118k(c);

(3) Treasury Department orders, issued prior to Reorganization Plan No. 1 of 1965 by the Tariff Commission (in the Court of Customs and Patent Appeals), 19 U.S.C. § 1515;

(4) Certain orders of the Department of Agriculture (in the district courts), 7 U.S.C. § 1365 (15 days), 7 U.S.C. § 608(c)(15)(B) (20 days), 7 U.S.C. § 499g(c) (30 days), and 7 U.S.C. § 210(f) (one year);

(5) Department of Labor orders under 33 U.S.C. § 921 (in the district courts within 30 days); and

(6) Post Office Department orders under 39 U.S.C. § 6212 (in the District of Columbia Court of Appeals only and within 20 days).

4. *Orders Reviewed Under the Administrative Procedure Act.* The orders of some agencies are reviewable only in nonstatutory review proceedings in accordance with the Administrative Procedure Act, 5 U.S.C. § 703:

> "In the absence or inadequacy [of a statutory review proceeding], the form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . ."

Orders reviewable only by injunction or declaratory judgment under these general provisions include orders not mentioned above of the following agencies:

(1) Federal Home Loan Bank Board,
(2) Department of Agriculture,
(3) Department of Commerce,
(4) Department of the Interior,
(5) Department of Justice,
(6) Department of Labor,
(7) Department of State and,
(8) Department of the Treasury.

In these situations, however, the administrative order is final and effective unless and until it is set aside by the court proceeding challenging its validity.

SUMMARY

In categorizing the various types of judicial enforcement provisions and classifying agencies in these categories, no attempt has been made to be exhaustive beyond the list of administrative proceedings set out in the document *Special Statutory Provisions Governing Judicial Review of Federal Administrative Proceedings, Parts I & II*, Committee on Judicial Review, Administrative Conference of the United States, August, 1962. Citations found therein were updated through 1967 by reference to Supplement III to the United States Code, 1964. Provisions of the Code relating to the Departments of Transportation and Housing and Urban Development were also examined. The focus of the inquiry was to discover whether among the various types of administrative orders described in the above mentioned document there were any which *must* be enforced in a manner similar to NLRB orders. The NLRB situation was found to be unique.

APPENDIX I

1962 RECOMMENDATION 18 WITH SUPPORTING REPORT

RECOMMENDATION NO. 18

It Is Recommended That—

The National Labor Relations Act be amended to provide in substance that a petition for review of a Board decision and order may be filed within 30 days in the appropriate court of appeals by the party seeking review; that if no such petition is filed, the board shall forthwith file a copy of the Board decision and order in an appropriate circuit court of appeals of the United States and that notice of such filing shall be served upon each respondent; that 15 days shall then be given to each respondent after notice to file objections to the order; and that if no such review is requested within that time, the clerk of the court shall then enter forthwith a decree enforcing the order of the Board.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES IN SUPPORT OF RECOMMENDATION ON ENFORCEMENT OF NLRB ORDERS

I. THE PROBLEM

Under the present statutes, orders of the National Labor Relations Board lack binding effect until entry of a decree of enforcement by a Court of Appeals. It has been contended that this requirement contributes to the delays which constitute a serious impediment to the vitality of the national labor relations laws. The question is whether there is a need to remedy the situation and, if so, what measures would be appropriate.

II. PRESENT PROCEDURES FOR ENFORCEMENT OF NLRB ORDERS

A. *The Statute*

Section 10(c) of the National Labor Relations Act, as amended, provides that if the Board finds that a person has engaged in an unfair labor practice, "then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Section 10(e) provides that "The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

Under Section 10(f), any person aggrieved by a final order of the Board may obtain a review of such order in a court of appeals under similar proceedings.

Section 10(g) provides that the commencement of proceedings under section 10(e) or (f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. Section 10 (i) states that "petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

B. *The NLRB's Statements of Procedure*

Pursuant to section 3(a)(2) of the Administrative Procedure Act, the NLRB has published in the Code of Federal Regulations a series of Statements of Procedure. The portions dealing with enforcement of Board orders are as follows:

1. *Compliance with Board Decision and Order*

Section 101.13. (a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D.C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

2. *Judicial Reviews of Board Decision and Order*

Section 101.14. If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. Or, the respondent may petition the circuit court of appeals to review and set aside the Board's order. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustain them if they are in accordance with the requirements of the law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's decree, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

3. *Compliance With Court Decree*

Section 101.15. After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's decree, the general counsel may, on behalf of the Board, petition the court to hold him in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

4. *Back-Pay Proceedings*

Section 101.16. After a Board order directing the payment of back pay has been enforced by a court order, the regional office computes the amount of back pay due each employee. If informal efforts to dispose of the matter prove unsuccessful, the regional director is then authorized to issue a "backpay specification" in the name of the Board and a notice of hearing before a trial examiner, both of which are served on the parties involved. The specification sets forth the computations showing how the regional director arrived at the net back pay due each employee. The respondent must file an answer within 15 days of the receipt of the specification, setting forth a particularized statement of its defense. The procedure before the trial examiner of the Board is substantially the same as in [original unfair labor practice case].

C. *Internal NLRB Procedures in Enforcing Board Orders*

Upon the issuance of a Board order in an unfair labor practice proceeding directing the respondent employer or union to cease and desist from committing the unfair labor practices which the Board has found and directing the taking of such affirmative action as the Board finds will effectuate the policies of the Act, the Regional Office in which the case arose attempts to secure the voluntary compliance with this order. If such compliance is not acheived the Regional Office refers the case to Washington for the institution of enforcement proceedings in the appropriate Court of Appeals. The Appellate Court Branch seeks full enforcement of all Board orders referred by the Regional Offices, unless the Board itself directs otherwise. Court proceedings may also be instituted by the employer or union against whom the order runs, or by any person who is aggrieved by the Board's failure to grant the relief to which such person believes himself to have been entitled.

When the case is received by the Appellate Court Branch (whether for enforcement or on petition for review) the case is assigned to a briefing attorney and to a briefing supervisor. Such assignments are normally made in the order in which cases are referred for enforcement and, depending upon the volume of work in the office at a particular time, will be made from 1 day to 2 weeks after the case is received. The briefing attorney reads the record, the briefs and exceptions filed by the parties, the intermediate report, and the Board's decision, and then discusses the issues in the case with his supervisor. This discussion, which normally takes place within a week after the case is assigned, will determine whether court proceedings will follow immediately or whether the case will be referred back to the Board for reexamination or correction in the light of problems or possible errors which the briefing attorney and his supervisor may have discovered. Only a very small percentage of the cases are referred back to the Board. The balance are prepared immediately for court review. Normally a petition is filed in the court anywhere from 3 weeks to 2 months after referral of the case for enforcement, depending upon the complexities of the case. Special circumstances, for example settlement negotiations, may delay the filing of a petition further in some cases.

The briefing attorney prepares a draft of the proposed brief to be filed in the Court of Appeals in support of the Board's order. The briefing attorney also prepares a designation of the parts of the record which are to be printed for the court's use in reviewing the Board's order. The briefing supervisor reviews the brief and, using his best judgment, may to the extent that it may be necessary either revise the draft or return it to the briefing attorney with suggestions. The brief is then reviewed by the Assistant General Counsel, who may have further changes to suggest. Shortly before the date on which the brief is due in court (the due dates are fixed by court rule varying from circuit to circuit and ordinarily depend upon the date the proceeding was instituted), the brief will be sent to the Government Printing Office and will be reviewed in page proof by the Associated General Counsel and occasionally by the General Counsel where the case may present issues of special interest to him. In many cases a further brief, a "reply brief", is filed following the receipt of the opponent's brief—such a brief is prepared and reviewed in the same manner.

After all the briefs are on file, the Court of Appeals sets the case for oral argument, which is ordinarily presented on behalf of the Board by the brief writer or the supervisor assigned to the case. If the court's decision is adverse or contains language which appears contrary to the best interests of the Board, the brief writer and supervisor may recommend the filing of a petition for rehearing. If filing such a petition is approved by the Assistant and Associate General Counsels, it will be prepared and reviewed in the same manner as the brief. . . .

Over the past 10 years a little more than 50 percent of the Board's decisions and orders in unfair labor practice cases have been taken to court on either a petition for enforcement or a petition for review. The figure for Fiscal 1960 was 52 percent. The highest recent figure was 73 percent in 1952—a figure which stands alone as inexplicably high; the lowest was 47 percent in 1955. Omitting 1952, the 10-year figures vary between 47 percent and 57 percent.

The caseload of referrals for enforcement or review in recent years has been as follows:

Fiscal year:	*No. of cases*
1961 (to April 21)	173
1960	197
1959	155
1958	110
1957	76

The Appellate Branch also handles contempt proceedings in cases involving disobedience of a decree enforcing a Board unfair labor practice order, Section 10(e) interim injunctive relief pending enforcement or review proceedings in the Courts of Appeals, and enforcement of Board backpay orders issued following the entry of a decree requiring a respondent to make whole employees who have been the victims of discrimination. Unlike proceedings for enforcement of a Board order, which are initiated following referral from a Regional Office without further authorization from the Board, contempt proceedings and proceedings looking toward a 10(e) injunction are cleared with the Board and specifically authorized in each case. Upon the receipt of a recommendation from a Regional Officer for the institution of contempt or 10(e) proceedings, the case is assigned to a brief writer and supervisor, just as in a regular enforcement case. They analyze the case and, if they concur with the Region's recommendation, they prepare a memorandum to the Board for the signature of the General Counsel recommending the institution of appropriate proceedings. If they disagree with the Region's recommendation, they prepare a memorandum for the Assistant General Counsel returning the case to the Region. In either event, the memorandum is then reviewed by the Assistant General Counsel and the Associate General Counsel before being forwarded either to the General Counsel for his approval or transmission to the Board, or back to the Regional Office, as the case may be. Where the question appears sufficiently close, a recommendation adverse to that of the Region may also be submitted to the General Counsel, and by him to the Board.

If the Board approves the institution of contempt or 10(e) proceedings, the papers initiating the court proceeding are prepared by the briefer and his supervisor and are reviewed in the same manner as an enforcement brief. Contempt proceedings may involve a protracted hearing before a court-appointed master and all the investigation and preparation for trial which precedes an ordinary unfair labor practice case. This work will normally be handled by the briefing attorney, often with the active cooperation of the Regional Office. Section 10(e) proceedings normally involve a short oral argument before the Court of Appeals, which will ordinarily be handled by the briefer or supervisor or Assistant General Counsel. Subsequent steps to a contempt proceeding such as briefs to the Master, exceptions to his report and oral argument in the Court of Appeals will be handled in the same manner as briefs and oral argument in an enforcement proceeding. Because of the importance and exacting demands of contempt and 10(e) litigation, such cases will normally be assigned to brief writers of outstanding capacity or long experience.

Backpay proceedings are referred in precisely the same manner as other proceedings for enforcement of Board orders, and are handled in the same manner as other enforcement proceedings except that instead of a routine petition for enforcement, we file a motion with the court asking that it direct the party objecting to the backpay award to indicate its grounds for stating that the court's decree should not be amended to include the specific amounts of backpay the Board has found due. This procedure effectively narrows the issues before the court so that our brief can be directed only to the specific points at issue rather than encompassing all conceivable issues in the case.

(Statement of Dominick L. Manoli, Associate General Counsel of the

NLRB before a Subcommittee on the House Committee on Education and Labor, May 8, 1961.)

D. *Background of the Provision Requiring Court of Appeals Enforcement Order*

At the time when the National Labor Relations Act was passed in 1935, the enforcement provisions represented a great advance over the situation which had prevailed under earlier Labor Boards during the NRA period. Milton Handler, who was General Counsel of the National Labor Board in the NRA period, testified that "under the present statute, interminable delays have resulted from the fact that numerous administrative hearings have been held by agencies without power to enforce their decisions. . . . Hence the need of an administrative agency with the power to issue orders enforcible in the courts." To the critics who asserted that unprecedented powers were to be vested in the new Board, Mr. Handler replied that "it must not be forgotten that the orders of the board are not self-executing; they can only be enforced in the courts. . ." (Legislative History of the NLRA, p. 66).

Francis Biddle, who was chairman of the old National Labor Relations Board, described the unsatisfactory enforcement situation:

> Between July 9, 1934, the date of its creation, and March 2, 1935, the National Labor Relations Board issued findings and decisions in 111 cases. In 86 of these the Board found that violations had occurred. In only 34 of these did the employer make appropriate restitution in accordance with our decision. In the remaining 52 of the 86 cases such compliance was not obtained. In these 52 cases, therefore, it was necessary for the Board to attempt to obtain enforcement through the removal of the 'blue eagle' or through court action. Of these 52 cases the Board referred 33 to the Department of Justice.
>
> The status of these 33 cases is as follows: In one case a bill in equity has been filed in the district court. Seven cases have been referred to the local United States Attorney, on the understanding that further evidence must be secured by him in cooperation with the Board before instituting suit. In none of these cases has suit been brought. In nine cases the Department of Justice has advised the Board that further investigation on certain points is necessary before the case can be referred to the local United States Attorney, and in three cases the Department has advised that as a matter of law no suit is justified. In 13 cases the Department has not proceeded for various reasons . . .
>
> What I am getting at is not in any sense a criticism of the Department of Justice, but to show that the system under which we are working and the machinery under which we are trying to enforce the law makes inevitable the break-down of legal enforcement, and the necessity for such

> machinery as the Wagner bill includes. (Legislative History of the NLRA, p. 1469).

Mr. Biddle was of the opinion that "the solution . . . is that adequate powers be given to a single experienced agency to find out the facts and carry through enforcement of the law up to the point of review in the circuit court of appeals."

Senator La Follette commented: "Even that will be slow enough."

Mr. Biddle replied that Senator Wagner had eliminated one step by providing they should go directly into the court of appeals rather than the district court. He noted that "it is not in any sense a novel procedure but on the contrary is one which has been adequately tested by the experience of other administrative tribunals, notable the Interstate Commerce Commission and the Federal Trade Commission." (Legislative History of the NLRA, pp. 1471–1473).

In summary, at the time of enactment of the court enforcement provision of the Wagner Act, it was regarded as a distinct improvement over the pre-existing situation; it was in line with the Federal Trade Commission procedure in existence at that time; and the delays in obtaining an effective order which have recently been observed were not then foreseen.

In 1940, the Monograph of the Attorney General's Committee on Administrative Procedure dealing with the National Labor Relations Board noted (p.2) :

> The Board's orders are not self-executing; no penalty attaches to a violation thereof; and the Government must resort by petition to the appropriate circuit court of appeals for enforcement of the order. . . . Since employers have nothing to lose by violating the provisions of the Act, except to receive an admonition to discontinue their activities, amendments to provide for more effective sanctions have frequently been advocated. Proponents for change have suggested that . . . Board orders be made effective upon issuance . . . none of these suggestions has eventuated in congressional action.

In its Final Report in 1941, the Attorney General's Committee on Administrative Procedure noted (pp. 82–83) :

> Statutes creating administrative tribunals generally provide methods by which their determinations may be judicially reviewed. In this way, a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the I.C.C. other than a suit by the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938, and it is true today of the National Labor Relations Act. . . .

> A method of review which has found considerable favor in recent legislation is that first enacted in the Federal Trade Commission Act of 1914, that is, review in a Circuit Court of Appeals with discretionary appellate jurisdiction in the Supreme Court. This method has been enacted both for cases in which the admininstrative order is self-operative as those under the Federal Trade Commission Act since 1938, and cases in which the order carries no sanction until it is approved by the court, such as in the case of orders of the National Labor Relations Board now.

However, the Attorney General's Committee did not make any recommendations to change the situation under which the orders of the NLRB lack a sanction until the Board obtains an enforcement order from the Court of Appeals.

The National Labor Relations Act was substantially amended in 1947 (Taft-Hartley Act) and in 1959 (Landrum-Griffin Amendments), but the Legislative Histories do not indicate any proposals or debates dealing with delay in enforcement due to the necessity for the Board to obtain a Court of Appeals order before the Board's order would carry any sanctions.

III. CRITICISMS AND PROPOSED REMEDIES

The "Cox Panel" Recommendation

(Report to the Senate Committee on Labor and Public Welfare on Organization and Procedure of the NLRB, prepared by the Advisory Panel on Labor-Management Relations Law, 86th Congress, 2d Session, Senate Document No. 81.)

After noting that "no change . . . is more important than speeding up the processes of decisions in unfair labor practice cases" and that [rights are] "hardly vindicated by a cease-and-desist order which does not become effective through court enforcement until two years later" (p. 10), the Panel made the following analysis and recommendation (pp. 16–17):

> *Enforcement and review of Board orders.*—Under the present statute an NLRB order carries no legal sanctions. The respondent may ignore it. The Board may file a petition for enforcement and 378 days later, on the average, a judicial decree may be entered enforcing the order of the Board.[29] Violation of this decree would be punishable as contempt. The long delay between the NLRB decision and an effective judicial decree is another unsatisfactory aspect of the present unfair labor practice procedure.
>
> One cause of the delay is the slowness of all appellate litigation. It takes time to print records and briefs. In some circuits the dockets are heavy. Some circuit courts do not sit in the summer months. The average time is built up by the 4 months mimimum delay attendant upon peti-

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[29] Memorandum from Hon. Boyd Leedom to a member of the staff of Senate Committee on Labor and Public Welfare, Feb. 11, 1959.

tions to the Supreme Court for writs of certiorari and the year or longer which the Supreme Court takes to hear cases on the merits. Manifestly this aspect of the problem is not peculiar to labor-management cases and cannot be solved by changes in the National Labor Relations Act.

A controllable factor is the time spent in negotiating about compliance with the Board's order. Once an order is passed there is no occasion for reviews by attorneys on the staff of the General Counsel or the proposed Administrator. If immediate compliance is not forthcoming, a judicial decree should be obtained.

The necessity of the Government's seeking judicial relief in order to put sanctions behind NLRB orders encourages procrastination by both private parties and the NLRB staff. No one questions the importance of allowing a full opportunity for judicial review but after the Board issued an order in a contested case it is not unfair to put upon the respondent the burden of complying or promptly seeking judicial relief.

The Federal Trade Commission Act provides that orders issued by the Federal Trade Commission under section 5 shall become final unless a petition for review is filed within 60 days. Violations of an order which has become final are punishable by a penalty of $5,000 for each day the violation continues. The monetary penalty seems inappropriate but it would expedite the entire process of enforcement and judicial review to adapt the rest of the Federal Trade Commission procedure to NLRB cases. An NLRB order should become final if the respondent does not file a petition for review within 30 days. Once the order becomes final the Administrator should be required forthwith to file a copy in an appropriate circuit court of appeals, with notice to the respondent. If the respondent does not file a petition for review within an additional 15 days, the order of the NLRB should, unless the court otherwise directs, be entered by the clerk as the decree of the court. Violations would be punishable by contempt. We also believe that any party to NLRB proceedings should be allowed to intervene in the appellate proceedings. This would clarify an uncertain issue.

These changes would accelerate postdecision litigation without impairing the procedural or substantive rights of any party. The panel unanimously recommends their incorporation into the NLRA. The necessary statutory changes will be found in sections 10(e) and (f) of the attached bill.

Respectfully submitted.

David L. Cole,
Guy Farmer,
Arthur Goldberg,
Charles Gregory,
Denison Kitchel,
Plato E. Papps,
Gerard Reilly,
Louis Sherman,
Russell A. Smith,
George W. Taylor,
W. Willard Wirtz,
Archibald Cox, *Chairman.*

January 15, 1960.

Sections 10 (e) and (f) of the "Cox Panel" bill are as follows:

> "(e) Any person (except the Administrator) aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within thirty days after the service of such order a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board and the Admininstrator and thereupon the Board shall file in the court a transcript of the entire record in the manner and form provided under section 2112 of the Judicial Code. Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant to the petitioner or any other party including the Board such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board. Any party to the proceeding before the Board shall be permitted to intervene in the court of appeals. No objection, that has not been urged before the Board on exceptions shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). Attorneys appointed by the Administrator shall appear on behalf of the Board in any proceeding under this subsection.
>
> "(f) If no petition for review is filed within thirty days, the Administrator shall forthwith file a copy of the order of the Board in a circuit court of appeals of the United States (including the Court of Appeals for the District of Columbia) within any circuit wherein the unfair labor

> practice in question was alleged to have been engaged in or where a respondent named in the order resides or transacts business and the court shall cause notice of the filing to be served upon each respondent. Within fifteen days of such service any respondent may file objections to the order, and the court shall thereupon proceed in the manner provided by subsection (e) as if a petition for review had been filed. If objections are not filed within fifteen days of such service, the clerk of said court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order of the Board.
>
> (Note: References to "the Administrator" deal with a separate proposal of the Cox Panel and can be deleted or supplanted by "the Board," as appropriate.)

The "Pucinski Subcommittee" Report

(Report of the Subcommittee on the NLRB of the House Committee on Education and Labor, 1961)

After noting that "by all odds, the witnesses stressed the delay in Labor Board processing of cases as the greatest impediment to effectuating the policy of the United States to encourage the practice and procedure of collective bargaining" (p. 8), and that "the Committee finds that there is much needless delay in enforcement of Board orders" (p. 2), the Subcommittee made the following summary of the testimony received in its hearings:

> ### *Enforcement and Review of Labor Board Orders*
>
> The problem of delay in proceeding before the Labor Board is compounded by the further delay in gaining judicial enforcement of the Labor Board order. Labor Board orders are not self-enforcing. The Labor Board has no authority to punish for violation of its decrees. Should a defeated party in a Labor Board proceeding decide simply to ignore the Labor Board decree, the Labor Board must request the appropriate court to enforce its order. This process takes, on the average, over a year. (Labor Board Member Boyd Leedom, then Chairman of the Labor Board, informed the Cox Panel in 1959 that the process of obtaining judicial enforcement took 378 days.)
>
> Many defeated parties take advantage of this year's delay. Dominick L. Manoli, Associate General Counsel of the Labor Board, testified that:
>
> > Over the past 10 years a little more than 50 percent of the Board's decisions and orders in unfair labor practice cases have been taken to court on either a petition for enforcement or a petition for review. The figure for fiscal 1960 was 52 percent. The highest recent figure was 73 percent in 1952 (tr. 178).
>
> But the year's delay in enforcement is not the only delay; much time is spent administratively prior to seeking judicial enforcement. Jacob Sheinkman, general counsel of the Amalgamated Clothing Workers of America, described the process as follows:
>
> > After issuance of such (Labor Board) order, the case is returned

> to the regional office of the Board from whence it arose, and there efforts are made to secure voluntary compliance with the terms of the order. In many cases the offending party ignores the plea for voluntary compliance, and only then are steps initiated to secure judicial enforcement by way of a decree of the appropriate U.S. court of appeals. It has been our experience that an average of at least 4 months elapses from the date of the Board order until the necessary papers are prepared and enforcement proceedings commenced in the courts.

The significance of these delays was pointed out by the testimony of Al Hartnett, secretary-treasurer of the International Union of Electrical, Radio, and Machine Workers:

> MR. HARTNETT. At the Greeneville Cabinet Co., in Greeneville, Tenn., a man was discharged because of union activity. He was discharged in April or May—I am not sure which it was—of 1950. We filed a charge. The case was first decided by the Board on February 27, 1953. That is a long period of time between the time we filed the charge and the time the finding is finally made by the Board. The employer was told to reinstate three employees and to cease and desist in discouraging union membership. We did not get enforcement of that order even though it was issued on February 27, 1953, until February 8, 1954, almost 4 years elapsing between the time of the incident and the time we finally got enforcement of the order. * * *
>
> As the situation now stands, a Board order is issued. We stumble and fumble along. Nobody really makes any effort to get it compiled with. Maybe there is a posting, maybe there is not. Finally, a sufficiently long period of time has gone by and enough pressure has been generated, maybe somebody finds their way into a courtroom to get enforcement of an order. * * *
>
> CONGRESSMAN ROOSEVELT. Is there any effective date now within which an appeal from a Board order must be made? * * *
>
> MR. HARTNETT. You can just delay, linger and wait. There is no time limit. Delay, linger, and wait. Stall as much as you can, wait as long as you can. By the time that somebody has gotten around to doing something about enforcing the Board order, 9 times out of 10, it is too late. The horse is gone, and the stable needs no locking at this point.

Mr. Hartnett recommended the following:

> First, we believe that orders shall be self-enforcing, with the burden placed upon one who contests an order to seek its review within a set period of time rather than as it now is upon the Board to institute enforcement proceedings. Second, we believe that Board orders should be effective for purposes of contempt proceedings pending review, unless the party seeking review can persuade the reveiwing court of cause to the contrary and obtain a stay of the Board's order * * *. We suspect that if the advantage of delaying the effectiveness of Board orders were eliminated from review and enforcement proceedings, fewer Board orders would be contested in court. The advantages flowing from elimination of delay to those whose rights

> have been infringed and to the public interest in seeking those rights enforced are undeniable. (Prepared statement.)

Mr. Guy Farmer, former Chairman of the National Labor Relations Board, and Mr. Louis Sherman, who served on the Cox Panel, gave joint testimony to the same effect:

> We have one very brief recommendation, although a very important one. * * * We recommend that Board orders, which are now of no effect until someone takes them into court to enforce, * * * be made self-enforcing after a given period of time during which a respondent would be given an opportunity to file a petition for review. If no such petition were filed within that time, the Board order would in effect become by filing in court a court order, and any violation of that order would subject that violator to the normal contempt citations.

The Subcommittee then made the following finding and recommendation:

> The subcommittee finds that there is much needless delay in enforcement of Labor Board decisions. The losing party "delays, lingers, and waits" because disobedience of a Labor Board order is not punishable.
>
> The subcommittee recommends a legislative change in sections 10(e) and 10(f) to require that, in the absence of an agreement to comply with the Board order, a petition for review of a Board decision and order must be filed within 30 days in the appropriate court of appeals by the party seeking review; that if no such petition is filed, the General Counsel would be required to forthwith file a copy of the Board decision and order in an appropriate circuit court of appeals of the United States and that notice of such filing would be sent to the respondent named in the order. An additional 15 days would then be given to the respondent after notice to seek review by the court. If no such review is requested within that time, the clerk of the court would then issue a decree enforcing the order of the Board.

Statements of NLRB Officials Before the Pucinski Subcommittee in 1961

BOYD LEEDOM, former chairman and present member of the NLRB:

> "I think the recommendation of the Cox committee should be adopted and the law changed so that our orders are, to use the phrase that has been applied, self-enforcing. . . . The thing that I think is bad and is different in our agency than in some agencies, is that the aggrieved party can just sit and wait, incapable perhaps of finding any good grounds to present to the court, in petition for review. Notwithstanding that he just sits there and waits and raises no objections, we must go through a long and involved court proceeding in the circuit court of appeals to establish the validity of our order." (Hearings, p. 1056)

STUART ROTHMAN, General Counsel of the NLRB:

"I believe there is merit in the suggestion that the Board's unfair labor practice orders should be 'self-enforcing.' Under the present statutory scheme a Board order carries no sanctions until or unless it is enforced by a court decree. It has been said that the long—and frequently unavoidable delay—between a Board decision and effective judicial decree enforcing that order has militated against effective enforcement of the Congressional policy in this area. To some extent at least this situation might be remedied by providing that a Board order shall become final unless within a specified time, say 60 days, the party against whom the order is directed petitions for judicial review. Absent such a petition timely filed, a decree should be entered enforcing the Board's order upon the Board's application for summary judgment." (Hearings, pp. 1108–9)

"I favor the proposal such as that made by the Cox committee, and reiterate it, in effect, in my prepared testimony. To make the Board order self-executing would be helpful. I should point out that there are other reasons why some of these cases that you refer to, and I don't know the particular ones, may appear to have taken longer than they should have. In some of these cases I believe that it is the situation that they have taken longer than they should have. But there may be a period, of course, after the Board has issued its order where the regional office seeks to achieve voluntary compliance and watches the matter to see whether or not the respondent comes into compliance. And then there may be, by reason of the facts and circumstances of the particular case, some reason why it takes longer in one case than in another. There may be representations which have been accepted that the order would be complied with voluntarily. So there may be instances where a case has taken longer than it should.

"It may be in such a case that the regional office and ourselves should have moved a little more rapidly than it has, to bring about enforcement. But in answer to your question, I support the idea of making Board orders self-enforcing." (Hearings, p. 1310)

FRANK W. MCCULLOCH, present chairman of the NLRB:

"I am quite ready to record my support for the suggestions that have been made about the possibility of amending the law to make the Board orders self-enforcing after a reasonable period for the filing of a petition for review by the respondents, and upon failure to so file, going into court, making the Board's orders self-enforcing, somewhat along the same line as has been done by the Federal Trade Commission." (Hearings, p. 1536)

GERALD D. REILLY, former member of the NLRB, now an attorney representing employers, and a member of the "Cox panel":

"If the legislation recommended by the Advisory Panel were adopted, all Board orders would automatically be filed for enforcement in the courts of appeals and would become final unless a petition for review by a party aggrieved was filed within 30 days.

"The purpose of this provision is to avoid the long delays which now occur between a final order of the Board and the docketing of a petition

> for enforcement in the courts of appeals. It would also place the burden of obtaining review upon the losing party." (Hearings, p. 766)

GUY FARMER, former chairman of the NLRB, now an attorney representing employers, and a member of the "Cox Panel" made the joint statement with a fellow panel-member, Louis Sherman, who represents unions, which the Subcommittee quoted in its report and recommendations. In addition, the following colloquy occurred:

> MR. PUCINSKI: "This is a procedure followed in other agencies now, isn't it?
>
> MR. FARMER: "The Federal Trade Commission is one agency that follows this procedure."
>
> MR. PUCINSKI: "And it could apply in labor-management relations, in your opinion?"
>
> MR. FARMER: "I see no reason why it should not. Sometimes in the past, the Board for one reason or another, and perhaps because of workload problems, there will be a great delay in filing a petition for review and the case is sort of left hanging there." (Hearings, p. 843)

IV. ANALYSIS OF PROBABLE EFFECT OF THE COX PANEL PROPOSAL

The objective would be to reduce the time within which an effective order can be obtained. Under the Cox Panel proposal, this would be accomplished by the Board order becoming an order of the Court of Appeals within 45 days, unless the respondent has petitioned for review within that time.

The time periods which elapse under the present system during various stages of the enforcement procedure are revealed in the following statistics which have been supplied by Marcel Mallet-Prevost, Assistant General Counsel of the NLRB.

Computation of days involved in case processing—

> The following information has been compiled from the files of the Appellate Court Branch. Both the average and median number of days are indicated.[1]

Number of days from issuance of Board's Decision and Order to referral of case to General Counsel for enforcement

	Fiscal 1959	*Fiscal 1960*	*Fiscal 1961*
Average	62.0	69.8	58.2
Median	35.8	43.0	37.9

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[1] Averages are obtained by dividing the total number of days involved in all the cases by the number of cases. Median figures indicate that fifty percent of the cases have longer time periods than the median and fifty percent have shorter time periods.

Number of days from referral for enforcement until petition filed with Courts of Appeal

	Regular cases	Regular plus suspended cases
	Fiscal 1959	
Average	74.3	81.8
Median	67.5	69.4
	Fiscal 1960	
Average	76.6	82.9
Median	69.6	70.8
	Fiscal 1961	
Average	44.8	51.0
Median	44.0	46.8

Action on cases after referral is sometimes suspended for various reasons, such as, to allow the Regional Office time to negotiate compliance of settlement, or to refer the case to the Board for further consideration. This delays the filing of the petition. In 1961 there were 16 such cases out of a total of 153 enforcement referrals. Accordingly, the "Regular Cases" column more accurately reflects the flow of work.

Number of days from filing of petition to decision by Courts of Appeal

	Fiscal 1959	*Fiscal 1960*	*Fiscal 1961*
Average	250.9	261.4	313.0
Median	236.7	262.5	240.5

Speaking in very round figures, it takes about 50 days from the date of the Board's order to the date when the case is referred to the General Counsel for enforcement. Again in very round terms, it takes another 50 days until a petition for enforcement is filed, or a total of 100 days before the average case reaches the Court of Appeals. The Cox Panel proposal would reduce this to 30 days, and if the respondent did not petition for review within an additional 15 days, the Board order would become the order of the Court. Of course, if the respondent does petition for review, the present proposal would not affect the amount of time that is consumed in trying the case in the Court of Appeals—roughly 250 days.

The principal effect of the proposal would be to require the respondent to make up his mind promptly whether to seek review. It would probably assist in achieving compliance with the orders of the Board by putting pressure on the respondent to reach this decision. As indicated in the testimony before the Pucinski Subcommittee, there is reason to believe that in a substantial number of cases, the respondent delays compliance while the

Board is going through the rather slow process of seeking an enforcement order. The following figures, supplied by Marcel Mallet-Provost, Assistant General Counsel of the NLRB, seem to bear that conclusion out.

Cases in which respondent complied after referral to General Counsel for enforcement and before Court of Appeals decision

Fiscal year	*Referred*	*Compliance before CA decision:*	*Percent*
1959	155	31	20
1960	197	33	16.7
1961	222	59	26
1962	305	72	23.6

According to Mr. Mallet-Provost, most of the cases of compliance occurred after the petition for enforcement was filed with the Court of Appeals and sometimes after the Board's brief was filed.

One of the principal advantages under the proposed procedure would be the saving of time and effort on the part of the Board's attorneys in this type of case. Where the Board seeks the enforcement order, it must prepare a brief justifying the Board position on points which may not be contested by the respondent. Putting the burden on the respondent to seek review would have the advantage of focusing attention on the particular points which he wants to contest.

It is not believed that the proposed procedure would shift the "burden of proof" before the Court of Appeals. Whether the respondent is petitioning for review or the Board is petitioning for an enforcement order, the statutory test of "substantial evidence on the record considered as a whole" would apply in either situation.

The proposed procedure would not appear to create difficulties with respect to back pay proceedings. Even where the order of the Board becomes the order of the Court after 45 days, later controversies over the amount of backpay due can be handled in the present manner by filing a motion with the court asking that it direct the party objecting to the backpay award to indicate its grounds for stating that the Court's decree should not be amended to include the amounts of backpay the Board has found due. (See Mr. Manoli's summary of this procedure, supra, p. 6.)

The proposed procedure would have a salutary effect upon compliance discussions in the Regional Offices. These have a tendency to become long and drawn-out, and the 30-plus-15-day provisions for the Board's order to become an effective order of the Court would speed them up. Of course, the respondent retains the full right of judicial review, but if he wishes to challenge the Board order, he must take the responsibility of seeking the review. It should be noted that respondents frequently petition for review under present procedures, particularly where some choice as to the Circuit is involved. Out of 97 briefs filed by the Appellate Court Branch in the Courts of Appeals in fiscal year 1960, for example, 23 were on an aggrieved person's petition for review, as distinguished from a petition by the Board for an enforcement order.

V. COMPARISON WITH ENFORCEMENT PROCEDURES OF THE FEDERAL TRADE COMMISSION

At the time when the National Labor Relations Act was passed in 1935 the statutes governing the work of the Federal Trade Commission required the F.T.C. to obtain an enforcement order from the Court of Appeals before its orders carried any sanction.

However, the Federal Trade Commission Act was amended in 1938 and the Clayton Act was amended in 1959 so as to make F.T.C. orders "self-enforcing." At the present time, a cease and desist order becomes final 60 days after date of service upon the respondent, unless within that period the respondent petitions an appropriate Court of Appeals for review. In case of review, the F.T.C. order becomes final after affirmance by the Court of Appeals. Violation of a cease and desist order after it becomes final subjects the offender to suit brought by the Department of Justice in a U.S. District Court for recovery of a civil penalty of not more than $5,000 for each violation. In the case of a continuing violation, each day of its continuance is a separate offense. Violation of an F.T.C. order which has been affirmed by a decree of a Court of Appeals makes the respondent further vulnerable to contempt proceedings in that court.

Thus, while the NLRB proposal recommended by the Cox Panel and the Puccinski Subcommittee is "adapted from" the current F.T.C. procedures, there are substantial differences. The NLRB proposal would rely on making an NLRB order become an order of the Court of Appeals within 45 days, in the absence of a petition for review by an aggrieved person, and thus subject to the ultimate contempt-of-court sanction. The Cox proposal would not make the NLRB order itself "final" in the sense of carrying a civil penalty sanction.

Apparently the enforcement procedures at the F.T.C. were more attenuated, prior to the 1938 and 1959 amendments, than at the NLRB, as is indicated by the legislative history of the 1959 amendments. The situation under the F.T.C. Act and the Clayton Act was thoroughly described by Sigurd Anderson, member of the F.T.C.:

> Under both acts (the Federal Trade Commission Act and the Clayton Act), the Commission must investigate and, after complaint, prove on the record developed during hearings violations of the act before orders to cease and desist may issue. Although the two acts, as originally enacted, contained similar provisions for the enforcement of such orders, Congress, on the occasion of the passage in 1938 of the Wheeler-Lea amendment to the Federal Trade Commission Act, provided for the finality of orders issued under that act. As stated by the House Committee on Interstate and Foreign Commerce at page 4 of report No. 1613, 75th Congress, 1st session, on S. 1077:
>
> > The provisions of subsections (g) to (k) of section 5, inclusive, are for the purpose of making definite and certain when the Commission's orders to cease and desist become final, and are similar to those found in the Revenue Act of 1926, fixing the time when the orders of the Board of Tax appeals become final.
>
> Under the Federal Trade Commission Act, by reason of the 1938 Wheeler-Lea amendment, an order to cease and desist becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time. Once an order has become final, the Commission can certify the facts of a violation to the Attorney General who may then proceed in an appropriate district court for the recovery of civil penalties. In contrast, the Clayton Act contains no provision for finality of the order and no procedure for the securing of civil penalties for violations thereof.
>
> Existing procedures under the Clayton Act are laborious, time consuming, and expensive. After a Clayton Act order to cease and desist has been issued, following investigation, complaint and proof of violation on the record, the Commission must again investigate and again prove violations of the order and of the act before the Commission's order to cease and desist. Only then, if the respondent violates the act a third time, by virtue of being in contempt of court, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law.
>
> As the Clayton Act now stands, a person found to have violated that act is not made subject to an effective order to cease and desist. The original proceeding at Commission level is a preliminary skirmish prerequisite to the Commission's going to court with respect to a subsequent violation. And it is only the court's order, issued after the subsequent showing of violation, that compels obedience.
>
> The effectiveness of the Clayton Act has long been handicapped by the absence of adequate enforcement provisions. The proposed legislation

would fill this enforcement void. The need for the amendatory legislation became even more pressing in 1952 when the Supreme Court decided *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470. Prior to that decision, the Commission proceeded for enforcement of Clayton Act orders by cross-petition in cases where respondents had petitioned for review in the U.S. courts of appeals. In Ruberoid, the Supreme Court held that the courts were without authority to issue an order commending obedience to an order of the Commission under the Clayton Act until the Commission had established violations of its order. Commenting on this holding, Justice Jackson stated in dissent:

> I see no real sense, when the case is already before the court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt. 343 U.S., at page 494.

It is indeed an anomaly that orders issued by the Commission in furtherance of the general proscriptions of the Federal Trade Commission Act have finality, whereas orders issued following violations of the more specific prohibitions of the Clayton Act do not. Not only is the present situation anomalous, but the Clayton Act stands incomplete until such an amendment as that proposed is enacted. The Commission believes that proper implementation of an effective antitrust policy requires correction of this situation.

The Commission has been aksed to comment on objections to the bills contained in statements submitted by the American Bar Association and the Association of the Bar of the city of New York.

The American Bar Association has characterized the Commission's position of favoring the legislation as simply a plea for uniformity of enforcement procedure for Commission orders, whether issued under the Clayton Act or the Federal Trade Commission Act. We believe that this contention has already been answered in the foregoing portion of this statement where we have demonstrated that the proposed legislation is required to provide compliance with an act which the Congress undoubtedly intended should be enforced.

Both bar associations stress an assumed "right" or a respondent not to have to go to court as long as he is willing to comply with the order to cease and desist which has been issued against him. This position totally ignores the right and the interest of the public in having an effective order outstanding against a law violator.

The Commission's order is issued in the course of an adjudicative proceeding wherein a respondent has been found to have violated a law enacted by the Congress. Provision should be made for the completion of such an adjudication. The logical sequence of events should be that if a respondent objects to a Commission order for any reason, he should appeal to a court within a reasonable time so that the matter can be decided once and for all. He should not be allowed to sit back, possibly for years, and then not only contest the charges of a new violation, but be in a position to challenge all of the aspects of the original case upon which the Commission's order was based, as well as that order itself. Congress has already expressed its disapproval of such a frustrating and complicated procedure in its consideration and passage of the Wheeler-Lea amendment to the Federal Trade Commission Act.

The bar associations attempt to buttress their argument by making a general attack upon the breadth of the Commission's Clayton Act orders. This attempt confuses the problem of drafting appropriate orders in particular cases with the questions of whether orders should be made final. There is no relevancy between the two subjects. No one would suggest that courts be deprived of their injunctive powers because of a disagreement in a particular case with the specific order entered. And, in any event, the proposed legislation provides for adequate court review of Commission orders.

The Commission cannot discuss the question of the appropriate breadth of orders in a vacuum. Suffice it to say that in the very case relied upon by the American Bar Association in support of its argument, *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470, the majority of the Court decided that the Commission was justified in issuing the order that it did and upheld the court of appeals' affirmance of that order.

Whatever the challenge to a Commission order may be, the Commission feels that challenge should be raised in court within a reasonable time after the Commission's adjudication, at which time all of the protections which the American Bar Association urges would be available to the respondent.

Both bar associations oppose the proposed provision for civil penalty of not more than $5,000 for each violation of the final order with each day of a continuing violation being deemed a separate offense. They state that the penalty is too severe and point to the fact that the majority of penalties imposed under such a provision in the Federal Trade Commission Act have been for less than $1,000 per count.

The monetary and other economic interests involved in Clayton Act proceedings are substantial and orders to cease and desist, though made final, would be ineffective unless adequate civil penalties are provided. Under the comparable provision in the Federal Trade Commission Act, various penalties in excess of $1,000 per count have been imposed and there have been three judgments, one by default, where full $5,000 penalties for single violations were assessed. It can be assumed that instances may also arise under the Clayton Act where violations will merit the full $5,000 penalty or some figure in excess of $1,000.

In considering the possibility of the proposed provision constituting an onerous burden upon respondents, it is important to recognize that the $5,000 figure per violation is the maximum amount that may be imposed. It is to be assumed that courts would, under the Clayton Act as they have under Federal Trade Commission Act, exercise their judgment to impose appropriate penalties. It is interesting to note the following discussion of penalty provisions by the House Committee on Interstate and Foreign Commerce at the time it reported on the then proposed Wheeler-Lea amendment to the Federal Trade Commission Act:

> Subsection (1) provides that any person, partnership, or corporation who fails to obey an order of the Commission to cease and desist after it has become final, and while it is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered by a civil action brought by the United States. The object of the provision is to enforce obedience to the Commission's orders to cease

and desist after such orders have become final through approval of the courts or through the failure of respondents to seek review. Similar provisions are contained in the Packers and Stockyards Act of 1921 (sec. 195, title 7, U.S.C.A.) and in the Securities Exchange Act of 1934 (sec. 78y(a), title 15, U.S.C.A.) (Hearings on Finality of Clayton Act Orders, before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 86th Congress, First Session, May 27, 1959, pp. 17–20).

From 1938 to 1959, there were 92 cases under Section 5 of the FTC Act in which civil penalties were assessed. The highest single case penalty was $38,000, and the penalty in the great bulk of the cases amounted to from $1,000 to $5,000. (See pp. 28–29 of the above House Judiciary Subcommittee Hearings for a complete list).

In the fiscal year of 1962, the amounts of civil penalties assessed in FTC Act cases were as follows:

Docket	*Name of Case*	*Court*	*Concluded*	*Judgment*
6222	Vulcanized Rubber & Plastics Company.	E.D. Pa.	10–9–61	$6,000
6086	Empire Press, Inc., et al	N.D. Ill.	12–5–61	Injunction
6089	Personal Drug	E.D. N.Y.	12–8–61	$2,000-Inj.
5342	National Toilet Company	Tenn.	12–19–61	$5,000
6426	Sterling Materials Company, Inc. et al.	E.D. N.Y.	2–6–62	$11,000
6426	Carbozite Protective Coatings	E.D. N.Y.	2–6–62	$11,000
6426	Ohmlac Paint & Refining Company.	E.D. N.Y.	2–6–62	$6,000
6140	George's Radio & Television Company.	D.C.	2–2–62	$6,000
5975	National Educators, Inc., et. al.	D.C.	2–12–62	$8,000
6342	Sun Vacuum Cleaner Company.	Md.	2–21–62	$3,000-Inj.
3964	Fong Wan, et al	N.D. Cal.	6–4–62	$1,300
3639	Parfums Corday	S.D. N.Y.	6–6–62	$13,000
6916	Fire Safety Services, Inc., et al.	Md.	6–11–62	$28,000
6644	Magic Weave, Inc., et al.	Mass.	6–28–62	Injunction

(Supplied by Barry W. Stanley of F.T.C.)

It can be seen from these figures that the potentially high $5000-a-day penalty has not, in practice, resulted in unconscionably high penalties.

The processing of these civil penalty cases is slowed up and the enforcement is made less efficient than it could be by the fact that the proceedings are brought by the various U.S. Attorneys throughout the country. The extent to which the legal staff of the FTC participates in these cases varies considerably among the offices of the U.S. Attorneys.

As to the experience under the 1959 "Finality" Amendments to the Clayton Act, there is very little to date. Only two civil penalty cases have been filed and they are still at the discovery stage. (*FTC* v. *Time Magazine* and *FTC* v. *Hearst,* both in the U.S. District Court for the Southern District of New York). The lack of experience with the operation of the 1959 amendments is largely due to the holding of the courts that the "Finality Amendments" apply only to FTC orders under the Clayton Act which became final after the effective date of the 1959 Amendments. Thus if a respondent violates today an FTC order issued before that effective date, the civil penalty provision does not apply. See *Sperry Rand Corp.* v. *FTC*, 228 F.2d 403 (CADC, 1961).

One effect of the 1959 Amendments to the Clayton Act has been to focus attention of the need for clear and precise cease and desist orders where the respondent is vulnerable to civil penalties. In *FTC* v. *Henry Brock and Co.*, 82 Supp. Ct. 431, 436 (1962), the U.S. Supreme Court stated:

> We do not wish to be understood, however, as holding that the generalized language of paragraph (2) (of the commission's order) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

In summary, it is too early to assess the effects and workability of the 1959 Amendments to the Clayton Act, but the similar procedure of making orders final after a fixed period of time under the 1938 Amendments to the FTC Act has worked fairly well, and is certainly a considerable improvement over the preexisting system.

VI. CONCLUSION

Professor Leroy S. Merrifield, special consultant to the Committee on Judicial Review, has talked informally with Archibald Cox, Russell Smith, and Guy Farmer. They do not recall the precise source of the proposal within the Advisory Panel, but Mr. Cox stated that it was obviously adapted from the Federal Trade Commission procedure. Mr. Smith recalls that Arthur Goldberg favored the proposal. There were no comprehensive studies or memoranda prepared on the matter within the Panel.

Professor Merrifield has also talked informally with Stuart Rothman, Dominick Manoli, Marcel Mallet-Provost, A. Norman Somers and Melvin Welles at the NLRB, who are or have been responsible for enforcement proceedings in the Courts of Appeal. They all would favor the Cox Panel proposal.

The proposal appears to have attracted wide support from Board members and officials and from reputable attorneys for both management and labor. Opposition might come from those employer interests who find it advantageous to seek delay. Unions would probably be more inclined to favor it; the impact would probably fall more on employers than on unions, since the employers already have the benefit of "mandatory" injunctions against the more important union unfair labor practices under section 10(1) of the Act.

It is our conclusion that it is necessary to eliminate delay wherever possible in NLRB procedure in order to have an effective law; that the proposal of the Advisory Panel headed by Archibald Cox is basically sound and would result in an average time saving of something like 55 days in getting an effective order without foreclosing in any way a full opportunity for judicial review.

RECOMMENDATION NO. 11

PUBLICATION OF A "GUIDE TO FEDERAL REPORTING REQUIREMENTS"

Popular demand for the official index digest entitled "Guide to Record Retention Requirements" indicates that a companion piece covering the matter of Federal reporting requirements would serve a public need.

RECOMMENDATION

1. Each agency subject to chapter 35, title 44, United States Code, entitled "Coordination of Federal Reporting Services," should make separate digests of and citations to each statutory provision and each regulatory provision relied upon by the agency for the solicitation of information as contemplated by chapter 35.

2. After consultation with the Bureau of the Budget, the Director of the Federal Register should prescribe the style, coverage, and submission of such digests, and should publish the overall "Guide to Federal Reporting Requirements" in the Federal Register in the same manner used for the publication of the "Guide to Record Retention Requirements."

REPORT OF THE COMMITTEE ON INFORMATION, EDUCATION, AND REPORTS IN SUPPORT OF RECOMMENDATION NO. 11

The idea of compiling a guide to reporting requirements was born at the time the guide to record retention requirements was being planned in 1955. At that time it appeared wise to let compliance with the Federal Reports Act, as amended (44 U.S.C. 3501–3511) mature over a longer period before undertaking such compilation.

The success of the annual *Guide to Record Retention Requirements* has been notable. The time now seems right to bring out the companion piece covering reporting requirements.

Annual distribution of the *Guide to Record Retention Requirements* has gone over 57,000 copies, of which about 51,000 represent paid mail orders. This clearly demonstrates a public need. Even more remarkable is the collateral salutary effect of presenting the requirements in one concise package. Official and private comparison resulted in self criticism and a marked tendency to imitate the best examples demonstrated by the *Guide.*

There would seem to be every reason to believe that a guide to reporting requirements will be equally popular, and that visual proximity will lead to corresponding improvements by way of imitation of the best examples.

The format of the proposed guide to reporting requirements and the matters of printing and distribution would follow closely the example of the *Guide to Record Retention.* Because of differences in the statutory provisions, the procedures and standards governing compilation and coverage would be somewhat different.

Under the provisions of 44 U.S.C. 3501–3511, the Bureau of the Budget has primary responsibility for administering the matter of Federal reporting requirements. The coverage of the guide will be limited by the terms of the statute and of the decisions and rules issued by the Director of the Bureau of the Budget. (See BOB Circular A–40, revised February 12, 1968.

With these considerations in mind, the Committee submits that the proposed "Guide to Federal Reporting Requirements" will (1) make important information more readily and authoritatively available to the public; (2) tend to improve the fairness and uniformity of reporting requirements; and (3) assist the Bureau of the Budget in controlling compliance with the pertinent statutory provisions.

The following is offered as an example of a potential entry in the guide:

XVII. Federal Trade Commission

1. *Export trade associations.* Statement setting forth location of offices, names and addresses of officers, stockholders, and members, together with copies of certificates or articles of incorporation and bylaws, or copies of articles or contract of association.

Timing: Within 30 days after the association's creation and on January 1 of each year thereafter. 15 U.S.C. 65

RECOMMENDATION NO. 12

ANALYTICAL SUBJECT-INDEXES TO SELECTED VOLUMES OF THE CODE OF FEDERAL REGULATIONS

Currently the Code of Federal Regulations is updated annually by the issuance of some 112 revised books. Many of these books are self-indexing. The usefulness of some books may be greatly impaired by the lack of an analytical subject index.

RECOMMENDATION

1. Each agency contributing substantially to the CFR should review its materials and (*a*) determine what books should include an analytical subject index, and (*b*) arrange for the preparation and publication of requisite indexes.

2. The Office of the Federal Register should review proffered indexes and arrange for the publication of those that appear to be professionally adequate.

REPORT OF THE COMMITTEE ON INFORMATION, EDUCATION, AND REPORTS IN SUPPORT OF RECOMMENDATION NO. 12

The general and permanent rules of Federal agencies are codified in the Code of Federal Regulations under functional titles which represent broad subject areas. This orderly arrangement is somewhat self-indexing. At the beginning of each book there is a contents listing which gives the user an overall view of the subject coverage, and within each book there are listings of the headings of the various sections included. As an additional retrieval aid, a general subject guide called the CFR Index is published separately and revised each year.

The CFR Index, however, is not a detailed analysis of the provisions in the Code. Rather, it serves as a general guide to regulatory areas. While this may be adequate for much of the Code, some individual volumes appear to need analytical subject indexes because of the nature of the material covered. The administering agency may be the only source of the technical program knowledge needed to prepare an in-depth analysis by subject matter.

Some agencies prepare subject indexes to their own regulations for in-office convenience and for separate publication. These might be adapted for use in the Code with little change. One example is already available. Title 35 of the Code of Federal Regulations contains a detailed subject index to the Canal Zone Regulations which was prepared by the agency and now is carried in the CFR under arrangement with the Office of the Federal Register.

All agencies covered by 5 U.S.C 552 should evaluate their regulations as published in the CFR to determine whether desirable assistance can be given to the public by the inclusion in the CFR of a comprehensive subject index to any given book. When such index appears warranted, the agency should prepare it for transmittal to the Office of the Federal Register for publication as part of the book involved.

RECOMMENDATION NO. 13

ELIMINATION OF DUPLICATIVE HEARINGS IN FAA SAFETY DE-CERTIFICATION CASES.

RECOMMENDATION

The Federal Aviation Administrator has authority to revoke or suspend the licenses of aviation personnel and training facilities, airworthiness certificates, and other permits related to the operation of aircraft. Present procedures contemplate a full trial-type hearing, if one is desired by the respondent, before the Administrator issues an order of suspension or revocation. If an appeal is taken from that order, a second full hearing is afforded by the National Transportation Safety Board. This is wasteful of time and personnel, and is unnecessary as a protection of affected parties.

In order to expedite proceedings bearing directly on public safety, without sacrificing the interests of individual respondents, the Federal Aviation Administrator should discontinue providing hearings in the nature of trials in "certificate actions." This will not result in "punishment before trial," since the effective date of a certificate action order is invariably postponed, except in emergency situations, pending the outcome of proceedings before the National Transportation Safety Board.

REPORT OF THE OFFICE OF THE CHAIRMAN IN SUPPORT OF RECOMMENDATION NO. 13

Prepared by
David E. Kartalia
Staff Attorney

I. Scope and Background

Under Title VI of the Federal Aviation Act of 1958,[1] the Administrator of the Federal Aviation Agency may issue and "amend, modify, suspend, or revoke" a variety of air safety certificates. This report deals with the procedure in formal decertification cases, i.e., actions to amend, modify, suspend, or revoke outstanding certificates. As discussed more fully in Part II below, this procedure is of particular interest because it permits a single case to be tried *twice* at the administrative level.

The certificates subject to this de-certification, or "certificate action," process fall into seven statutory categories.[2] Certificate of the first two categories known as "type" and "production" certificates respectively, evidence the Administrator's satisfaction that the interests of safety have been adequately protected in the development and production of aircraft and aircraft components. "Airworthiness certificates," a self-explanatory term, are the third category of certificates; these are issued to registered owners of aircraft. "Air carrier operating certificates," the fourth category, should not be confused with certificates of air carrier route authority issued by the Civil Aeronautics Board; the FAA certificates relate only to the safety aspects of an air carrier's enterprise. The fifth category, "airman certificates," is, for reasons stated below, the most important category so far as this study is concerned. These certificates license the activities of pilots and other flight crew members, flight instructors, aircraft mechanics, dispatchers, control-tower operators, and even parachute riggers. The sixth category of certificates attests to the suitability of "air navigation facilities." Finally, the seventh category, "air agency certificates," involves judgments as to the adequacy of training schools, repair stations, and so forth.

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[1] 49 U.S.C. §§ 1421–30 (1964).

[2] See 14 U.S.C. §§ 1422–24 and 1426–27 (1964).

Although the process under examination applies to all of the foregoing certificates, the practical significance of the process is much more limited. The respondent in a formal certificate action proceeding is almost always an airman, and usually a pilot. The experience of the FAA's hearing officers during fiscal years 1967 and 1968 illustrates the pattern just described. Out of 227 new cases received by the hearing officers in that 24-month period, 226 involved airman certificates; and of those 226 cases, 203 involved pilots' licenses. The balance of 23 was distributed among mechanics (20), flight engineers (2), and flight navigators (1).[3] For the sake of convenience, and in recognition of the predominant impact of the formal certificate action process, this report occasionally refers to the respondent in a certificate action case as "the pilot."

Although certificate action cases have been characterized as "remedial," they are generally punitive in the sense that a sanction is sought to be imposed because of alleged improper conduct. The typical case involves a pilot who is accused of violating one of the FAA's flight regulations. Similarly, mechanics usually become involved in the process upon being accused of not meeting applicable Agency standards in the performance of specified repair, maintenance or inspection work.

The Federal Aviation Agency closes well over 1,000 certificate action cases each year. In most of these cases the respondent ultimately surrenders his certificate without receiving a formal hearing. The cases which are closed after formal adjudicatory proceedings account for only 10 to 20% of the total.[4]

Certificate action is only one of two sanctions available to the Administrator in the conduct of his air safety enforcement program. The other sanction is the monetary fine, or "civil penalty."[5] Although the Administrator's civil penalty power is used extensively, the applicable procedure is entirely different from that in certificate action cases and is, therefore, excluded from the scope of this report. Civil penalty cases are either compromised informally or referred by the FAA to the Department of Justice for collection in court.[6]

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[3] Source: FAA docket sheets.

[4] See note 19 *infra*.

[5] 49 U.S.C. § 1471(a)(1) (1964).

[6] 49 U.S.C. §§ 1471(a)(2), 1474(b)(1) (1964).

II. The Problem

A pilot who is confronted with proposed certificate action enjoys a procedural option which fairly invites inquiry. In brief, the pilot may elect to go to trial upon the decidedly favorable principle, "Heads I win, tails we flip again." To take advantage of this opportunity, the pilot must request the "formal hearing" proffered by the Administrator's Notice of Proposed Certificate Action. This hearing will be conducted before an FAA "hearing officer" under procedural rules which provide for the essential trappings of a trial.[7] Accordingly, the burden of proof will be on the Administrator rather than the pilot.[8]

If the airman prevails at the FAA trial, the action is terminated. His adversary, the agency enforcement staff, has no recourse, because the Administrator has granted the hearing officers the power to decide certificate action cases in his name and stead.[9] But the pilot, on the other hand, is in no respect bound by an adverse decision of the FAA hearing officer. He may "appeal" his case to the National Transportation Safety Board and there receive a trial *de novo* before one of the Board's APA hearing examiners.[10] As before, the FAA staff will carry the burden of proof.[11]

The second trial in a certificate action case is usually a trial *de novo* in the literal sense of that term. That is, the findings of the FAA hearing officer and the record compiled before him are simply ignored in the second proceeding. In a few cases, the respondent has entered into a stipulation permitting all or part of the FAA record to be introduced into evidence before the NTSB examiner, but such action is not at all common. Thus, from the perspective of parties who are retrying a certificate case before a Board examiner, the FAA trial was a trial in name only; in retrospect, it was more a combination dress rehearsal and deposition session.

This procedure was described above as an *option* of the pilot. The characterization is appropriate because the pilot *need not* exhaust any FAA remedy before taking his case to the NTSB. He may simply avoid any dealings with the FAA, allow the proposed certificate action to ripen into final action, and then file his appeal with the NTSB. He may also file an appeal after taking advantage of the FAA's informal remedial procedures. Under FAA rules, each recipient of a Notice of Proposed Certificate Action is to be offered an opportunity to answer the charges in writing or to be heard in informal conference with FAA counsel.

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[7] 14 C.F.R. §§ 13.31–67.

[8] 14 C.F.R. § 13.59(b).

[9] 14 C.F.R. § 13.67(a). However, the hearing officer may not impose a sanction more severe than that specified in the notice of proposed certificate action.

[10] See 14 C.F.R. §§ 421.21–.50.

[11] 14 C.F.R. § 421.22.

Approximately 100 cases per year are appealed to the NTSB without passing through the FAA formal hearing process.[12] This number does, however, include so-called "emergency appeals." Emergency cases are those in which the Administrator has chosen to exercise his statutory power to make his order effective *pendente lite*. Such cases are not subject to the FAA formal hearing procedures; if contested, they go directly to the NTSB. An idea of the frequency of emergency appeals can be obtained from the fact that the Board disposed of 23 such cases during fiscal 1969. It is thus clear that airmen do not invariably take advantage of the two-trial process when it is available. Apparently, a significant number sacrifice this additional protection for the more expeditious direct appeal to the Board.

A study of cases docketed by FAA hearing officers during the 24-month period ending on June 30, 1968, disclosed that hearing officer decisions are appealed with some degree of regularity. The flow of cases between FAA hearing officers and NTSB examiners is not patently alarming, but neither is it *de minimis*. To illustrate, the FAA hearing officers received 227 cases during the subject period, and ultimately issued appealable orders (i.e., imposed certificate action) in 131 of them. A total of 51 were subsequently re-tried before the NTSB. In terms of an absolute number, this suggests an average of 25 cases moving each year to the NTSB for a second trial. In terms of percentages, it suggests that about 22% (51/227) of all new cases, and about 39% (51/131) of all appealable cases, are in fact tried twice.

These figures demonstrate that a respectable amount of governmental energy is dissipated by reason of the two-trial feature of the certificate action process. The question, of course, is whether it is not avoidable. It is certainly a basic assumption of our legal system that a defendant can be accorded "justice" in an adjudicatory system based on but one trial. Fortunately, the certificate action process does not force us to re-examine this assumption. The history of that system, as set forth in parts III and IV below, shows that the two-trial feature exists more through sufferance than design.

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[12] According to statistics supplied by the FAA for fiscal years 1966, 1967 and 1968.

III. Certificate Action: The Statutory Framework

Section 609 of the 1958 Act[13] prescribes certain procedures for certificate action cases. Except in "emergency" cases, the Administrator is required by Section 609 to initiate a certificate action case by advising the certificate holder of the *proposed* action and the basis therefor. The Administrator must then afford the holder "an opportunity to answer any charges and be heard as to why [his] certificate should not be amended, modified, suspended, or revoked." Thereafter, if the Administrator determines that "safety in air commerce or air transportation and the public interest" so requires, he may put his proposed action into effect.

Section 609 also provides that any certificate action order may be appealed to the National Transportation Safety Board, which, "after notice and hearing", may "amend, modify or reverse the Administrator's order." The Board, in the conduct of its hearing, is not "bound by the findings of fact of the Administrator." The Board's decisional touchstone is, like the Administrator's, phrased in terms of the requirements of "safety in air commerce or air transportation and the public interest.

Emergency cases, as heretofore noted, are cases in which the Administrator determines that his order should be effective immediately. In all others the filing of an appeal with the Board stays the effective date of the Administrator's order. The Administrator may also determine that an emergency exists after an appeal has been filed. In such a case, the statutory stay is superseded by the Administrator's determination. Under Section 609, the Board must dispose of an emergency appeal within sixty days after it is advised by the Administrator that an emergency exists.

That Congress, in passing Section 609, foresaw only one formal hearing in a certificate action case is hardly open to debate. This is to say there is significance in the fact that the section characterizes the requisite Board procedure as a "hearing" and the FAA procedure as only "an opportunity to be heard as to why," etc. The House committee report described Section 609 procedure as follows:

> When the Administrator revokes, modifies, or suspends a certificate under section 609, an appeal to the Board is provided.
>
> In order to expedite the safety enforcement process, section 609 of the legislation changes the present law by permitting the Administrator to amend, modify, suspend, or revoke safety certificates prior to formal pro-

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[13] 14 U.S.C. 1429 (1964).

> ceedings before the Civil Aeronautics Board. However, in order to protect the holders of certificates from arbitrary action, the Administrator is required, except in cases of emergency, before taking any action to advise the holder of the certificate of the nature of the charges against him and to give the holder an opportunity to present informally his defenses to the Administrator. If, after this informal presentation, the Administrator is still of the opinion that the certificate should be amended, modified, suspended, or revoked, the Administrator may take such action. Thereafter, if the holder of the certificate disagrees with the action of the Administrator, he may appeal to the Civil Aeronautics Board where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act. In this hearing before the Board, the Administrator will have the normal burden of proof to establish facts, justifying the amendment, modification, suspension or revocation of the certificate.[14]

To summarize the two salient points in this passage, the FAA procedure was seen as an informal conference, while the Board procedure was to be a formal adjudicatory hearing.

From 1958, when the FAA was created, until 1962, the procedure in certificate action cases conformed to the expectations of the framers of Section 609. The Administrator offered only an informal conference to the recipient of a Notice of Proposed Certificate Action.[15]

IV. "PROJECT TIGHTROPE" AND THE INTRODUCTION OF THE FAA TRIAL

The present two-trial system dates from 1962, when the FAA trial was introduced through an exercise of the Administrator's rulemaking authority. This action was taken, quite clearly, to implement the recommendation of an independent advisory group which is usually referred to by its code name, "Project Tightrope."

Project Tightrope was set in motion by Najeeb Halaby shortly after he became Administrator in 1961. Administrator Halaby appointed a panel of six prominent lawyers and commissioned them to study possible improvements in the Agency's rulemaking and enforcement procedures. This was done against a background of sometimes recriminatory relations between Mr. Halaby's predecessor and the FAA's "public." The prior Administrator had also made the enforcement process particularly visible to the aviation public by maintaining an "enforcement crackdown" between March 1959 and November 1960.[16]

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[14] House Report No. 2360, 85th Congress, 2nd Session (1958), p. 8. The Senate report contains similar language. See S. Rep. No. 1811, 85th Cong., 2nd Sess. (1958), p. 11.

[15] Report on Rulemaking and Enforcement Procedures: Project Tightrope (October, 1961), p. 12. A copy of this report is available in the library of the FAA.

Project Tightrope submitted its final report to Administrator Halaby in October 1961.[17] In addition to a number of recommendations concerning rulemaking and investigative procedures which are not pertinent to the present discussion, the report contained what amounts to a condemnation of the enforcement scheme authorized by Section 609. The power to punish summarily, with justification to be made—if at all—at a subsequent trial, reminded the panel of the Queen of Hearts' edict: "Sentence first—verdict afterwards." It was, they said, simply "too much power for the Administrator to want or to wield." In support of this conclusion the report offers the following concisely stated arguments:

> The present right of a disciplined airman to secure a de novo review from the CAB is, in our judgment, not equal to nor a proper substitute for a trial type hearing in advance of punishment. It puts the burden of moving forward on the wrong person. Anyone familiar with the problem of a citizen confronted by his Federal Government will appreciate that the whereabouts of the burden of moving forward is not an idle philosophical inquiry.
>
> Furthermore we are convinced—without being able to supply proof—that enforcement officials who know, as FAA officials know, that in only about 10 percent of their certificate cases will they have to present formal proof, and that the painstaking accumulation of relevant, reliable, probative and admissible evidence need be begun only when the accused appeals to the CAB, cannot have the same attitude, and the same scrupulous care in accumulating all the facts, which we always hope to find in those prosecutors who must be prepared to prove every charge before an independent tribunal.
>
> Finally, apart from its effect on substantive justice in particular cases, we believe that a procedure open to characterization as "punishment first, trial later" destroys the appearance of fairness that is so vital to public acceptance of any governmental regulation and enforcement system.

As a substitute for summary punishment, Project Tightrope recommended that the Administrator establish a corps of independent hearing examiners to hear and decide certificate action cases. The Administrator's Section 609 powers, with the exception of his emergency suspension power, were to be delegated to the presiding examiner "subject to [the Administrator's] personal review in cases where a severe punishment—such as revocation of a certificate—has been imposed." Cases were to be initiated, as in the past, by the Administrator's Notice of Proposed Certificate Action, except that the Tightrope-designed notice would advise the respondent of his right to an FAA trial. A failure to accept the "proffered hearing" within a specified period would operate as a default and the Administrator would then take the proposed action.

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[16] Report, Project Tightrope, *supra* note 15, p. 13.

[17] Report, Project Tightrope, *supra* note 15. See, in particular, pp. 18–21.

The Tightrope report acknowledged and dismissed two objections to this proposal: (1) that the 1958 act did not provide for formal hearings before the FAA; and (2) that some cases might be tried twice, since "those who demand a separate evidentiary hearing before the CAB may be legally entitled to it under the present statute." As to the first point, the group assured the Administrator that "since the provision of a hearing within the FAA increases rather than decreases the rights of the accused and appears to be well within the powers of the Administrator, it could hardly be subject to legal attack."

With regard to the second anticipated objection, the group indicated its disapproval of a two-trial system and suggested that it would be desirable to convert the Board trial into an appellate-type proceeding. In fact, the report recommended an amendment to Section 609 which would give the Board "discretionary power to decide whether the taking of more evidence is required." The recommendation was stated rather weakly, however, since the group was unwilling to say that the same result could not be achieved under the existing statute by unilateral action of the Board. Also tending to weaken the recommendation was an expressed willingness to accept a two-trial system, if necessary, as the price of an urgently needed reform. The group thought it probable that the twice-tried case would be an "infrequent" phenomenon in any event.

Early in 1962 the FAA implemented the essential features of the Tightrope recommendation. Apparently, however, the Agency never proposed an amendment to Section 609 along the lines suggested in the report.

V. ELIMINATING THE TWO-TRIAL PROBLEM

The best way to eliminate the two-trial problem in the certificate action process is to eliminate the FAA trial. The Administrator could do so simply by amending the agency's rules of procedure. There would be no need to seek enabling legislation, for Section 609 does not require the Administrator to provide anything more elaborate than an informal conference. On the other hand, it would be necessary to amend Section 609 in order to solve the two-trial problem by making Board procedure basically appellate in character. The language of that Section, supplemented by unambiguous statements in the pertinent Congressional committee reports, leaves little room to doubt that the NTSB hearing must be a trial.

Of course, mere ease of implementation would be a poor substitute for a sound result. But eliminating the FAA trial has, in addition, an important substantive advantage over changing the present Board procedure. The NTSB has an attractive degree of independence from the FAA even though both agencies are administrative units of the Department of Transportation. This fact should enure to the benefit of the Board's examiners presiding in certificate action cases, adding strength to their claim of neutrality as between certificate holders and the FAA staff. Moreover, because Board examiners are already experienced in certificate action cases this neutrality does not have to be bought at the price of competence.

"Punishment first, trial later" need not be the result of doing away with the FAA trial. Under Section 609 the filing of an appeal with the NTSB (which may be accomplished by a simple letter under Board rules)[18] stays the FAA certificate action order during the pendency of the appeal. Thus, actual punishment is possible only in the period between the entry of the Administrator's order and the filing of the certificate holder's appeal. But even this gap can be avoided by postponing the effective date of the Administrator's order for a period of time sufficient to permit the appeal to be filed. In fact, the FAA does provide for such a postponement as a matter of standard procedure. If this practice were to be continued after the elimination of the FAA trial, it would be quite inaccurate to characterize the certificate action process as "punishment first, trial later."

However, the report of Project Tightrope correctly pointed out that *appearance* of fairness is important in winning public acceptance of an enforcement system. It is therefore undesirable, as the report again makes clear, for such a system to be *open to characterization* as "punishment first, trial later." It would seem, though, that the appearance of fairness problem would be slight in this particular instance if the Agency properly informs its regulated public. It is a question of telling respondents, and also certificate holders in general, how the system actually works.

A final matter of interest is the apparent expectation of the Tightrope group that the implementation of its recommendations would encourage many more certificate holders to insist on formal hearings. This is certainly implicit in the group's argument, quoted *supra*, to the effect that the enforcement officials of that time lacked a strong incentive to investigate thoroughly, knowing, as they did, that they would be put to proof in only 10% of their cases. If the group did in fact expect to see a marked change in the ratio of hearing to nonhearing cases, the expectation has not materialized.[19] Discontinuing the FAA trial should not, therefore, have any great effect on that ratio either.

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[18] 14 C.F.R. § 421.21(a).

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[19] For example, in fiscal year 1966 the FAA entered 1,471 certificate action orders, 82 of which were entered after an FAA hearing. (1966 FAA Annual Report, p. 16). An additional 118 cases were appealed directly to the Civil Aeronautics Board. (Figure supplied informally by FAA). Even assuming that all appealed cases were subsequently tried, the Agency was put to proof in only 14% of the 1,471 cases.

RECOMMENDATION NO. 14

COMPILATION OF STATISTICS ON ADMINISTRATIVE PROCEEDINGS BY FEDERAL DEPARTMENTS AND AGENCIES

Government agencies which conduct formal or informal rulemaking proceedings or cases of adjudication which directly fix the rights and obligations of private persons (hereafter referred to as "proceedings")[1] owe a special duty to the individuals affected and to the general public to manage their caseloads as efficiently as possible, to eliminate inordinate delays in the conduct of proceedings, and to work continuously toward improving the fairness, effectiveness, and economy of their procedures. The present volume of Federal administrative proceedings is so great that much of the basic information needed in these efforts can be developed in intelligible and useful form only through statistical study. The compilation and publication of comprehensive statistics on Federal agency proceedings, at regular intervals would:

—Provide each agency with information concerning its business which would enable it to manage its caseload more effectively,

—Augment generally the information concerning its activities which each agency must furnish to the President, the Congress, and the public,

—Afford affected parties and their counsel a better understanding of the administrative processes which determine their rights and obligations, and

—Provide a basis for specific study of particular agency procedures by the agency itself, by committees of Congress, the Administrative Conference of the United States, the organized bar, research scholars, and other individuals and organizations, public and private, interested in improving the Federal administrative process.

RECOMMENDATION

1. To the extent deemed useful to advance the purposes of this recommendation, each Federal administrative agency which con-

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[1] The agency compilations proposed by this recommendation should not be limited to formal proceedings, or limited to "proceedings" as that term has been employed in gathering statistics for past conferences or Congressional groups. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests including the routine handling of applications and claims.

ducts proceedings (as defined above) affecting private persons' rights, privileges or obligations, should prepare annual statistical data pertaining to those proceedings, to be compiled in such manner and presented in such publications as the agency considers appropriate.

2. These statistical compilations should list the kinds of proceedings pending during the year, with a concise yet meaningful description of the nature and purpose of each kind of proceeding and citations for the statutory authority under which the proceedings are conducted, and the sections of the Code of Federal Regulations which set forth the rules of practice governing each kind of proceeding.

3. For the purpose of agency efforts that may be made in cooperation with the Chairman of the Administrative Conference of the United States, to lessen delays in administrative proceedings, the statistical compilation should show the number of days which elapsed during each significant step of the proceedings which were concluded during the year.

4. In designing each agency's compilation, the following information, together with the time-study data referred to in 3 above, should be considered minimal:

(a) The number of proceedings of each kind pending at the beginning of the year;

(b) The number of new proceedings filed or otherwise commenced during the year;

(c) The number of proceedings concluded during the year and the manner of their disposition (i.e., by settlement, dismissal on procedural grounds, decision on the merits without hearing, final decision by agency after hearing, and an examiner's initial decision, etc.);

(d) The number of proceedings remaining at the end of the year; and

(e) The number of proceedings concluded during the year which were appealed to the courts.

5. Each agency should periodically analyse all of the information thus compiled and should develop improved techniques fitted to its particular needs to reduce delays and expense and otherwise to improve its administrative processes. A copy of this analysis should be submitted to the Administrative Conference of the United States.

6. In presenting its statistical compilation, each agency should summarize this analysis and describe the specific steps it has taken toward the ends referred to in 5 above.

7. Each agency, in its subsequent compilations, should follow a pattern that makes possible a comparison of data with corresponding data for earlier periods, thus reflecting changes in backlogs, volumes, and elapsed times and providing a measure of the agency's experience following the specific actions referred to in 6 above.

REPORT OF THE COMMITTEE ON LICENSES AND AUTHORIZATIONS IN SUPPORT OF RECOMMENDATION NO. 14

Prepared by
The Staff of the Office of the Chairman

Statistics assembled by the Office of the Chairman of the Administrative Conference report that 527,436 formal administrative proceedings were pending before 34 departments and independent agencies of the Federal Government during the six-year period from July 1, 1960 to July 1, 1966. All of these cases were of kinds which normally involve oral hearings and decision on the basis of the hearing record.[1]

In numbers, these formal proceedings represent only a small part of the Federal administrative process. Presumably the volume of proceedings which are not decided on the basis of a hearing record far exceeds the number of formal cases. For example, the above total does not include approximately 75,000 U.S. Board of Parole cases during this period in which oral hearings were held, but the hearing provided only a part of the basis for decision. Similarly the total figure does not include the substantial number of cases which ordinarily are determined on written submissions without oral hearings, such as the approximately 1,800 proceedings conducted each year by the Trademark Trial and Appeal Board.

For purposes of the Administrative Conference statistics, the term "proceeding" was limited to disputed matters. The great bulk of the administrative process consists of the routine handling of large numbers of applications, claims, complaints, etc. which only rarely become the subject of "proceedings" in the sense that the agency's process for their disposition involves the receipt of opposing evidence and argument on disputed issues of law or fact. The Conference statistics therefore exclude, for example, the Federal Communications Commission's normal processing of radio station applications in the non-broadcast and non-common carrier field, such as applications for public safety, industrial, amateur, land transportation, aviation, and marine radio services (514,039 applications processed in 1967 and 523,550 in 1968).[2]

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[1] The Administrative Conference compilation notes the omission of a few cases of kinds for which figures are not available or which are instituted so infrequently that they are of no interest to the work of the Conference. Of the total number of proceedings, 28,897 still were pending at the end of the six-year period. A list of the reporting departments and independent agencies is attached as Appendix A.

The formal proceedings which are included in the figures assembled by the Administrative Conference are of great variety, ranging from social security hearings of consequence to a single pensioner to complicated rate cases of substantial impact upon entire industries and broad segments of the consuming public. Because of this variety, the 527,436 figures itself is of no significance. However it does serve to illustrate that the Federal administrative process is a governmental activity of considerable proportions.

The Administrative Conference Committee on Licenses and Authorizations respectfully submits that, because of the magnitude of the Federal administrative process, much of the information which is indispensable to an adequate understanding of that process can be developed and presented intelligibly and usefully only through statistical study. To manage its business effectively, an agency must have the means of understanding its operations. If changes in agency organization and procedure are to be made with confidence that they will produce greater fairness and effectiveness in future operations, they must be developed with a full understanding of past and present agency experience. In many areas of Federal agency activity only statistical study can assure such understanding. Without reliable data, efforts toward procedural reform in such areas may be only uncertain probes into a bottomless morass of imperfectly understood or misunderstood experience.

In particular, the problem of inordinate delays in the administrative process demands statistical study. Through the years of developing concern over the shortcomings of the administrative process as an important element of our system of government, critical attention has focused constantly upon this problem. One of the reasons for the extensive reliance of our system upon administrative agency processes has been the assumption that a specialized and highly expert administrative tribunal can appropriately dispose of a large volume of particular kinds of cases much more swiftly and economically than the courts. Although many agencies have labored commendably over the years to realize this objective, the problem of delay apparently remains today as one of major proportions.

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[2] FCC Annual Reports for 1967 and 1968.

A random sample of 5,000 cases reported in the Administrative Conference compilation as having traversed the full route through hearing, preliminary decision, exceptions, and agency final decision indicates that the total elapsed time from the date the matter was committed to the formal hearing process to the date of the final decision was in excess of 1,000 days in 730 cases, more than 5 years in 135 cases, and over 10 years in 38 cases. One proceeding lasted almost 20 years.

The average elapsed time for the 5,000 proceedings was 465 days, or 1 year and 100 days. These "total" times do not include whatever period the application, complaint, or claim, was under preliminary investigation, was on the agency's "processing line," was the subject of negotiations looking toward settlement, or simply was waiting in line, prior to its being committed to formal hearing procedures by designation for hearing or otherwise.

Obviously an administrative remedy which takes more time than the private party involved has to spend is no remedy at all. Because governmental activity now plays such a prominent role in business affairs, inordinate delays in public administration can constitute a serious encumbrance upon private business activity and private initiative and may, in its cumulative effect, slow the nation's economic development. For the individual to whom a particular agency action may be the difference between self-employment and a dead-end job, professional medical care or self-treatment, an education or an unskilled job, hospitalization or permanent disability, or self-sufficiency as a pensioner or dependence upon relatives, delays may work insufferable hardships.

According to the statistics of the Office of the Chairman of the Administrative Conference, the total volume of formal proceedings increased steadily over the six-year period of that compilation. Agency annual reports indicate that informal procedures increased at an even greater rate. Today there would appear to be no reason to expect that such growth will not continue.

The Committee is of the view that time has run out for casual efforts to combat inordinate delays in agency proceedings. The Committee believes that an intensive and concerted attack upon this persistent problem is long overdue.

Further, the Committee is convinced that the necessary first step, if the effort is to be effective in substantially reducing delays, is the compilation of comprehensive information on each agency's backlog of cases, its current volume of new proceedings instituted, the method of their handling and the manner of their disposition, and the significant details as to the time involved in their handling.

In concluding that there is a substantial need for statistical study of administrative proceedings, the Committee is not unaware of the limitations of statistical study, particularly where, as in the case of administrative proceedings, no two of the things being counted are exactly the same. As Kent Professor at Columbia in 1922, Harlan Fiske Stone, in a speech relating to judicial statistics, appropriately noted:

> "The statistical method of dealing with social problems often cannot be relied upon as a mathematical demonstration leading to specific conclusions, but it may be used to indicate tendencies, to mark out the boundaries of a problem, and to point the directions to be given to a particular investigation of a nonstatistical character."

The Committee fully appreciates the fact that statistics are seldom an end in themselves. However, carefully tailored to the purposes they are intended to serve, they can be an indispensable tool for effective management of agency caseloads and an invaluable device in the location of procedural problems and their causes.

In part because of the limitations of statistical study, but perhaps more because of the dissimilarity of statistical techniques to the traditional methods of legal research, statistics have not enjoyed extensive use by study groups in the area of administrative reform. In 1939 the Attorney General's Committee on Administrative Procedure collected some data on the volumes of administrative proceedings and the time periods involved in their disposition. The statistical undertakings of the Hoover Commissions were somewhat more ambitious. The first continuing compilation was initiated by the Office of Administrative Procedure in the Department of Justice in 1957. That series at the outset was limited to formal proceedings conducted by examiners appointed pursuant to section 11 of the Administrative Procedure Act and was patterned in some respect after the statistics of the Administrative Office of the United States Courts.

The temporary Administrative Conference of 1961 and 1962 compiled data for those two years, expanding somewhat the Office of Administrative Procedure series and utilizing computer processing. When that effort ended, the Senate Judiciary Subcommittee on Administrative Practice and Procedure, in cooperation with the Office of Administrative Procedure, continued the series for one more year, 1963, and later collected and held for processing the raw data for the years 1964–1966, in anticipation of the establishment of the statutory Administrative Conference. The Office of the Chairman has had these figures computer-processed and, combining them with the 1961–1963 figures, now has completed a six-year compilation. Although budget limitations have precluded printing this compilation, it is undergoing careful study by the Conference staff and is available for the use of the committees of the Conference and others who may find it helpful.

Past efforts to provide comprehensive statistical data have been invaluable to the work of the Office of Administrative Procedure and to the 1961–62 Administrative Conference in providing needed information of which no other research technique is capable. However, for two principal reasons, the products of these efforts have never realized their full potential. First, the considerable variety of agency functions and the resultant variety of procedures among the agencies severely limits the utility of any design or format for a statistical compilation which seeks to measure the same factors in all proceedings across-the-board. For example, the Committee discussed one kind of procedure in one of the major regulatory agencies in which the really costly delays occur before the matter becomes a "proceeding," as that term was used in compiling the Administrative Conference figures. This procedure was contrasted with others in other major regulatory agencies in which an applicant often files for operating authority with no intention of prosecuting his application, but rather only to assure his place as a party in a comparative proceeding in the event competitors seriously prosecute applications for the same authority. There simply is no way of providing comparable time-study data on these two kinds of proceedings by any single, across-the-board compilation design. There are many other examples of this kind of problem.

The Committee concludes therefore that, in order to go beyond the utility of the present Administrative Conference statistical compilation, the statistical studies for each agency must be tailored carefully to fit the particular procedures of the individual agency, rather than conformed to any across-the-board pattern.

The second principal limitation upon the utility of past statistical efforts results from the fact that the design of the compilation in each case has followed, rather than preceded, the experience which the compilation reported. A thoughtful decision by each agency before the year for which figures are to be compiled begins, so that arrangements can be made in advance for the recording of the desired information, obviously will provide much more useful data than can be recovered after the year has ended.

The Committee therefore recommends that each agency determine precisely what information it needs to deal effectively with problems of inordinate delays and expense, etc. in its own administrative processes, and make whatever recording or reporting arrangements are necessary before the beginning of the next fiscal year, so that comprehensive information concerning that year's experience may be assured.

The Committee believes that every agency should compile and make available basic data reflecting the nature and proportions of the agency's caseload generally. The various factors measured by the Administrative Conference statistics may provide a pattern for the agencies in designing these basic statistics. The Administrative Conference compilation consists of three parts, the first of which provides a general "catalog" of formal proceedings. It is the Committee's idea that the agency compilations proposed by this recommendation should not be limited to formal proceedings, or indeed to proceedings, as that term was employed in assembling the Conference data. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests, including the routine handling of applications and claims such as those of the Federal Communications Commission.

Part I of the Administrative Conference compilation, the listing of formal proceedings, describes briefly the nature and purpose of each different kind of proceeding conducted by each department or independent agency, usually indicating how and by whom the proceeding is instituted and what kind of relief or sanction is contemplated, with citations for the agency's authority and its rules of practice governing the particular kind of proceeding. Part I also provides a general classification of proceedings into a dozen broad categories and indicates as to each kind of proceeding whether it is subject to the requirements of sections 556 and 557 of title 5 of the United States Code, formerly sections 7 and 8 of the Administrative Procedure Act.

Part II reports, for each kind of proceeding, the case input and output during the year and indicates generally the manner in which cases were disposed of. Specifically, it consists of a 13-column schedule under the following column headings:

1. Cases pending at the beginning of the fiscal year

2. Number of new cases commenced during the year
3. Number of cases reopened during the year
4. Total input of cases for the year
5. Number of cases closed during the year by agency decision on the merits after hearing and preliminary decision
6. Cases closed by agency decision on the merits after hearing without a preliminary decision
7. Cases closed after hearing by preliminary decision which became final without review by the agency
8. Cases closed by decision on the merits without an oral hearing
9. Cases closed by withdrawal, consent, settlement or other agreement
10. Cases dismissed without the consent of the parties, on procedural grounds
11. Other final disposition (describe in footnote)
12. Total output of cases for the entire year
13. Balance remaining at the end of the fiscal year

Obviously the various columns indicating the manner in which cases were concluded can be made much more meaningful in an individual agency's compilation by dividing the total output into categories which reflect the particular agency's experience instead of the experience of all agencies generally. This limitation of the Administrative Conference statistics is well illustrated by the inadequacy of the above-described column headings in relation to the many kinds of cases, for example, in which no preliminary decision is issued.

Part III of the Administrative Conference statistics provides basic time-study data on random samples of the cases which involved oral hearings (the proceedings reported in columns 5, 6, and 7 of Part II) and, for the years 1964–66, on random samples of the cases reported in column 8.

In addition to basic backlog, volume, and time-study data of this general nature, each agency should include in its own compilation whatever data it feels may be useful for purposes of special statistical studies. For example, if an agency feels that the answer to its particular caseload problem may be greater use of settlement and compromise techniques, it should assemble and report whatever data may serve that purpose. It should study and decide in advance exactly what statistical information might be useful in developing procedures for settlement, then collect and report such information. For example, how many cases are settled, at what stage of the proceeding, and subject to what conditions? What is the incidence of those factors which the agency is able to identify as factors which limit the opportunity for settlement or otherwise militate against settlement, etc.

Examination of recent annual reports of a number of departments and agencies indicates a considerable amount of volume data, both on proceedings and on the routine processing of undisputed matters, is made available in such reports. Occasionally there is laso information int he nature of these special-purpose statistical studies such as the example above. However, there is virtually no information which would assist in meeting the problem of inordinate delays. Much more comprehensive statistics are needed to fulfill the objectives stated at the bottom of the first page of the recommendation.

To repeat the same statistical information at regular intervals accomplishes much more than simply multiplying such information. The continuing accretion of data, in effect, adds a third dimension to the demonstration. It enables comparisons over a period of time which indicate the direction in which the reported experience is moving as well as the effect of procedural or other changes. An essential part of the Committee's recommendation, therefore, is that each agency should collect and publish its statistics as a continuing series. Obviously the publication should be annual. In the opinion of the Committee, the department and agency annual reports provide an ideal opportunity for such annual publication.

The principal thrust of the recommendation of the Committee on Licenses and Authorizations is that statistical analysis of an agency's administrative procedures should, in the first instance, be a regular and important activity of the agency itself. The responsibility for fair, expeditious, and effective procedures is, in the first instance, in the agency. The immediacy of the agency's experience with its procedures affords it a special competence which makes its own analysis far more useful than study by outside experts.

The role of the Administrative Conference under its statutory responsibility for the collection of statistics and information concerning agency procedures should be as a central exchange or "clearing-house" for specific ideas for improvements in procedures developed from the individual agencies' analyses and as a forum for both comprehensive and particularized study of the experience of the several departments and agencies. But the collection and publication of fundamental statistical information, carefully fashioned to the particular agency function, should be the duty of the individual agency in the first instance.

The Committee is convinced that detailed study by each agency of its own experience can provide insights into procedural problems which no amount of examination by an extrinsic body, however expert, can provide. By the same token, the universal experience represented by the Conference membership can provide a comprehensive understanding of administrative procedures beyond the competence of any individual agency. The many serious problems of the Federal administrative process demand the best efforts of the agencies and of the Conference.

In the past, statistical study has been laborious. Today, every agency has its own computer facilities or, at nominal expense, can arrange for the use of the facilities of some other agency. The Committee is confident that, with such capability, continuing statistical study of administrative procedures by the agencies themselves, with the help of the Administrative Conference, will eliminate the general uncertainty which attends so many of our present procedural problems and will contribute substantially in ultimately eliminating excessive delays and improving the fairness and effectiveness of agency procedures.

APPENDIX A

DEPARTMENTS AND AGENCIES WHOSE PROCEEDINGS ARE INCLUDED IN THE 1960–1966 STATISTICAL COMPILATION OF THE OFFICE OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE

1. Department of Agriculture
2. Atomic Energy Commission
3. Civil Aeronautics Board
4. Civil Service Commission
5. Department of Commerce
6. Department of Defense
7. Federal Aviation Agency
8. Federal Coal Mine Safety Board of Review
9. Federal Communications Commission
10. Federal Deposit Insurance Corporation
11. Federal Home Loan Bank Board
12. Federal Maritime Commission
13. Federal Power Commission
14. Federal Reserve System Board of Governors
15. Federal Trade Commission
16. General Services Administration
17. Department of Health, Education and Welfare
18. Department of the Interior
19. Interstate Commerce Commission

20. Department of Justice
21. Department of Labor
22. National Aeronautics and Space Administration
23. National Labor Relations Board
24. National Mediation Board
25. National Science Foundation
26. Post Office Department
27. Railroad Retirement Board
28. Securities and Exchange Commission
29. Small Business Administration
30. Department of State
31. Subversive Activities Control Board
32. Tennessee Valley Authority
33. Department of the Treasury
34. Veterans' Administration

RECOMMENDATION NO. 15

CONSIDERATION OF ALTERNATIVES IN LICENSING PROCEDURES

Court decisions, notably *Scenic Hudson Preservation Conference* v. *FPC*,[1] have emphasized that in licensing cases the Federal Power Commission must explore and give proper consideration to possible alternatives to the specific plan proposed by the applicant. This principle may in the future be applied to other licensing agencies. Since the range of possible alternatives in any case can be extensive and in some cases virtually unbounded, ways must be sought to control the scope and duration of licensing proceedings within manageable limits while meeting the requirements of the law.

RECOMMENDATION

Each agency which issues licenses, permits, or other forms of authorization, should seek to create procedures fitting its particular circumstances which will assure appropriate consideration of alternatives where necessary, and at the same time will permit effective administration of that agency's licensing functions.

Because the various agencies must deal in their licensing procedures with many diverse subject matters, the Administrative Conference cannot specify a single rule and procedure for achieving this objective. Procedural techniques which experience has shown useful in analogous situations and which an agency might consider include: (1) Guidelines embodying a rule of reason concerning the number and character of alternatives to be considered in particular types of cases; (2) rules providing a point in time beyond which the issues in a proceeding will not be expanded to include additional alternatives except under compelling circumstances; (3) techniques, such as prehearing conferences and the filing of testimony in written form before trial, which tend to promote early identification of interested parties and important alternatives; and (4) placing responsibility upon the party or other person proposing an alternative to the applicant's proposal to make an appropriate threshold showing that the alternative deserves the agency's consideration.

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[1] 354 F.2d 608 (2d Cir. 1965) *cert. denied*, 384 U.S. 941 (1966). See also *Udall* v. *FPC*, 387 U.S. 428 (1967).

REPORT OF THE COMMITTEE ON LICENSES AND AUTHORIZATIONS IN SUPPORT OF RECOMMENDATION NO. 15

1. Background

Under a principle supported by a number of recent court decisions, the duty of an agency in a licensing case goes beyond the task of determining whether the applicant's proposal would result in a net gain to the public.[1] These cases assert that the agency must, in addition, consider alternative courses of action which might serve the public interest *better* than the specific proposal of the applicant. Moreover, the agency will not necessarily fulfill this duty in a particular case if it merely considers whatever evidence regarding alternatives the private parties happen to bring forward. The agency has, rather, an independent and affirmative obligation to see that alternatives are adequately explored before a decision is rendered.

Scenic Hudson Preservation Conference v. *FPC* [2] is the leading decision on this subject. In *Scenic Hudson* the Federal Power Commission had issued an order authorizing a power company to construct and operate a hydroelectric facility on the Hudson River.[3] During the course of the formal administrative proceedings which led to the issuance of this licensing order, the proposed project had been vigorously opposed by conservationist intervenors, who argued that the facility would desecrate an area of unique scenic beauty. The conservationists did not seriously question the company's need for an additional source of bulk power. Instead, they maintained that the public interest dictated that the company be forced to rely on a source other than the proposed project. The Commission found, however, that the company's proposal was superior to any of the suggested alternatives, including power which the company might be able to purchase from interconnected systems, as well as power which it might generate by alternative methods.

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[1] *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir., 1965), *Cert. denied*, 384 U.S. 941 (1966), *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C. Cir. (1968); *Marine Space Enclosures, Inc.* v. *FMC*, No. 22,936 D.C. Cir., July 30, 1969. And see *Citizens for Allegan County, Inc.* v. *FPC*, No. 21,842, D.C. Cir., April 29, 1969 (*dictum*).

[2] 354 F.2d 608 (2d Cir., 1965), *cert. denied*, 384 U.S. 941 (1966).

[3] See 16 U.S.C. 797(e) (1964).

On petition for review of the Commission's order, the Court of Appeals for the Second Circuit concluded that the FPC had "failed to make a thorough study of possible alternatives" to a plant which was to be located in what the court referred to as "an area of unique scenic beauty and major historical significance." The court found "no evidence in the record to indicate that . . . the Commission . . . ever seriously considered" power from interconnecting systems as an alternative. In addition, the court dismissed the evidence relating to gas turbines as a combination of "self-serving" statements on behalf of the applicant and "scanty," "hastily prepared" testimony offered by the intervenors.

The court held, in effect, that the Commission cannot rely on the adversary process to bring all necessary facts to its attention.

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
>
> . . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[4]

It is made abundantly clear in other portions of the opinion that the term "relevant facts" includes at least some alternatives. The set of included alternatives is variously described by the court as those which are "possible," or "reasonable," or "feasible."

Apparently because it viewed the FPC as having an affirmative duty to explore alternatives, the court held that the Commission erred in refusing to re-open the record to permit the taking of additional testimony regarding the gas turbine alternative. The testimony in question had been offered by a taxpayer and consumer group in support of its eleventh-hour petition to intervene. The FPC rejected the petition and the proffered testimony as untimely, since the filing was made after the Commission had heard oral argument in the case. But the Second Circuit brushed aside the question of timeliness, noting that the petition was filed more than two months before the Commission entered its order licensing the Hudson River project.

It is possible to conclude from the opinion in *Scenic Hudson* that the affirmative duty to explore alternatives is a Federal Power Act specialty. Section 10(a) of that Act requires the Commission to find:

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[4] 354 F.2d at 620.

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require modification of any project and of the plans and specifications of the project works before approval.[5]

The reference in Section 10(a) to a "comprehensive plan" clearly was regarded as significant by the court in *Scenic Hudson.* At one point in the opinion the court flatly states:

> The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.[6]

And at another point the court cited Section 10(a) in support of the following statement:

> The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility.[7]

On the other hand, the court said that the Commission disregarded not only "the statute" but "judicial mandates" in failing "to probe all feasible alternatives." The judicial mandates to which the court referred are *City of Pittsburgh* v. *FPC*[8] and *Michigan Consolidated Gas Co.* v. *FPC.*[9] Both of these cases were decided, however, under the Natural Gas Act,[10] a statute which lacks any language comparable to that of Section 10(a) of the Federal Power Act. Working with nothing more peculiar than the "public convenience or necessity" standard in Section 7(b) of the Natural Gas Act, the court in *City of Pittsburgh* observed:

> The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal.[11]

Michigan Consolidated, which involved a Commission order authorizing the abandonment of natural gas service, arose under the same section of the Natural Gas Act. In remanding that case to the Commission for consideration of a settlement proposal filed with the FPC by an intervening party, the court stated:

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[5] 16 U.S.C. 803(a) (1964).

[6] 354 F.2d at 622.

[7] *Id.* at 620.

[8] 237 F.2d 741 (D.C. Cir., 1956).

[9] 283 F.2d 204 (D.C. Cir.), *cert. denied,* 364 U.S. 913 (1960).

[10] 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w (1964).

[11] 237 F.2d at 751.

> Even assuming that under the Commission's rules [the applicant's] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, the proposal appears prima facie to have merit enough to have required the Commission at some stage in the proceeding to consider it on its own initiative as an alternative to total abandonment.[12] (Emphasis in original.)

City of Pittsburgh and *Michigan Consolidated* therefore anticipated much of what was later said in *Scenic Hudson*. For this reason, agencies which issue licenses under a "public interest" standard, or a simple variant thereof, would be well-advised to view Section 10(a) of the Federal Power Act as conducive, but not wholly indispensable, to the position taken in *Scenic Hudson*. Indeed, the broader interpretation of *Scenic Hudson* is supported by recent decisions of the Court of Appeals for the District of Columbia Circuit. That court has cited *Scenic Hudson* with approval in cases involving the Shipping Act [13] and the Natural Gas Act.[14]

Additional applications of the *Scenic Hudson* doctrine may become apparent from time to time through the efforts of imaginative practitioners. For example, common carrier merger proceedings would seem to represent an area in which the impact of *Scenic Hudson* is likely to be felt.[15] However, in certain other areas, such as the licensing of nuclear reactors, the narrow focus of the applicable decisional criteria may preclude any extensive application of the doctrine.[16]

II. The Problems

The possibility that *Scenic Hudson* will prove to have a widespread impact on the Federal administrative process suggests that all licensing agencies should be fully aware of the procedural problems which seem to inhere in an affirmative undertaking to probe all feasible alternatives.

First among these problems is, of course, the sheer number of alternatives which might have to be investigated. The implications of delay and expense are obvious. The evaluation of just one alternative may be a formidable task requiring the participation of engineers or economists and the performance of sophisticated tests or statistical studies. Then too, the testimony with respect to a single alternative could take up several full hearing days.

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[12] 283 F.2d at 224.

[13] *Marine Space Enclosures, Inc.* v. *FMC*, note 1 *supra*.

[14] *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953, 973 (1968).

[15] *E.g.*, railroad merger proceedings under 49 U.S.C. 5(2) (1964).

[16] Under 42 U.S.C. 2134(b), the responsibility of the Atomic Energy Commission in licensing nuclear reactors is "to promote the common defense and security and to protect the health and safety of the public."

What an attempt to probe "all feasible alternatives" might entail is indicated by the proceedings in the *Scenic Hudson* case on remand before the FPC. By May, 1969, more than seventy days of hearings had been held, and evidence had been introduced on the following alternatives:

—*Alternative hydroelectric sites.* The Commission's staff made a study of thirty-five potential hydro sites; twenty-three were studied by the applicant.

—*Opportunities to purchase power at wholesale.* The testimony covered four systems with which the applicant was then interconnected, plus two other conceivable interconnections.

—*Alternatives suggested by the applicant.* After a computer study eliminated a number of alternatives as impractical, the applicant introduced evidence on the following: (1) 2–1000 mw conventional steam units; (2) 2040 mw of gas turbine capacity; (3) 2000 mw of nuclear capacity; (4) 1000 mw of nuclear capacity plus 1088 mw of gas turbine capacity; (5) 8–250 mw fossil fuel peaking units; and (6) 1000 mw of nuclear capacity plus 4–250 mw fossil fuel peaking units.

—*Alternatives suggested by intervenors.* The principal intervenor in the case, a league of independent groups with an interest in conservation, made an extensive presentation on a combination of 5–140 mw peak load gas turbines and a 1000 mw nuclear unit. Other witnesses sponsored by the same intervenor gave testimony on (1) a 2000 mw nuclear alternative, (2) 1,800 mw of gas turbine capacity, and (3) 810 mw of gas turbine capacity plus a 1000 mw nuclear unit.

—*Exotic alternatives.* Brief testimony was heard on such "exotic" sources of electrical energy as fuel cells and MHD (magnetohydrodynamic) generators.

—*Relocation of powerhouse.* The major alternative of the Commission's staff was a proposal which would have shifted the applicant's powerhouse to a nearby site and put it entirely underground. Staff studies indicated that this alternative would reduce the adverse scenic consequences of the project while producing an economic bonus for the applicant.

—*Alternate transmission line routes.* In addition to a number of different overhead transmission routes, cost evidence was introduced on five possible underground routes.[17]

The gas pipeline licensing function of the FPC provides another illustration of how a single case can involve numerous alternatives. Consider, for example, this statement made by counsel for an intervening landowner in a 1968 case:

> We suggest, Mr. Examiner, that the route selected by the company is not the route that best serves the public convenience and necessity. We believe there are several alternative routes, even alternatives within the context of the proposal made by the company, modifications to it, which might be better adapted to serve the interests of not only [his client] but other landowners in the area and provide better protection for public safety.[18]

Clearly, the phrase "all feasible alternatives" is capable of defining an imposing number of issues.

Some alternatives may not be suggested, indeed may not even become apparent, until a proceeding is well underway. Thus, unless some meaningful requirement of timeliness can be imposed, the scope of a particular hearing could be not only very broad but ever-expanding. In addition, the number of parties may well grow as additional alternatives are introduced, since any alternative may threaten interests which are not threatened by the applicant's proposal.

III. Responding to the Challenge of Scenic Hudson

The decision in *Scenic Hudson* merits careful consideration by all Federal agencies which issue licenses, permits, or other forms of authorization. Although the practical significance of the case may vary considerably from one licensing function to another, it would be a wise precaution in each instance to evaluate the challenge of the court's mandate. Where the exploration of alternatives could have a significant dilatory impact, some thought should be given to the establishment of principles and procedures which both recognize the alternative plan doctrine and provide assurance that it will not paralyze the particular licensing function.

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[17] These alternatives are discussed in a hearing examiner's initial decision dated August 6, 1968 and a staff brief on exceptions dated October 7, 1968. FPC Docket No. P–2338.

[18] Transcript of record, p. 93, *Shenandoah Gas Co.*, FPC Docket No. CP 68–196.

An appropriate adjustment to *Scenic Hudson* would involve some degree of agency control over the number of alternatives to be considered, and the period during which alternatives may be suggested. The first task may be difficult. It will involve the development of guidelines specifying a reasonable range of alternatives. This could be done either by rule or by order in individual cases. In either event, the exclusionary effect of the guidelines would have to be tempered by providing for an expansion of the issues where a party is able to make a suitable threshold showing on the merits of an additional alterantive. Establishing a time limit is, of course, not difficult and could likewise be accomplished either by rule or by order.

Exclusionary rules or orders must, however, be accompanied by greater efforts to identify potentially fruitful alternatives. In this regard, the agency's staff should normally play the leading role. In addition, procedural techniques, such as pre-hearing conferences and the advance submission of direct testimony in written form, might be used successfully to expose the various logical alternatives to an applicant's proposal.

Conscientiously designed procedures for the consideration of alternatives are likely to be respected by the courts. Even though *Scenic Hudson* does not specifically acknowledge a power on the part of the FPC to impose reasonable limits concerning the consideration of alternatives, it cannot be assumed that the court intended to preclude efficient administration of the Federal Power Act or any other statute. The answer must be that a "rule of reason" is compatible with the teachings of *Scenic Hudson.*[19]

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[19] See *Citizens for Allegan County, Inc.* v. *FPC*, *supra* note 1, slip opinion at p. 13, where the court stated:

> . . . We agree that the FPC has an active and independent duty to guard the public interest, and that this may require consideration of alternative courses, other than those suggested by the applicant. This does not mean that the FPC must always undertake exhausting inquiries, probing for every possible alternative, if no viable alternatives have been suggested by the parties, or suggest themselves to the agency.

RECOMMENDATION NO. 16

ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS

RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.

REPORT OF THE COMMITTEE ON RULEMAKING IN SUPPORT OF RECOMMENDATION NO. 16

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I. THE PROBLEM

In 1941 the Attorney General's Committee on Administrative Procedure concluded that the rulemaking processes of federal agencies "should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."[1] The Committee realized that the knowledge of an administrative agency is rarely complete, an administrative agency is not ordinarily a representative body, its deliberations are not usually carried on in public, and its members are not subject to direct political controls in the same way as are legislators. Consequently, public participation "in the rulemaking process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests."[2] The message of the Attorney General's Committee is as sensible today as it was when first communicated. Very substantial reasons suggest that the interested public should have an adequate opportunity to contribute to the rulemaking process.

The most obvious reason why such public participation is desirable is that it helps to elicit "the information, facts, and probabilities which are necessary to fair and intelligent action"[3] by those responsible for promulgating administrative rules. Since an agency's own accumulated knowledge and expertise are rarely sufficient to provide all the needed data upon which rulemaking decisions should be based, agency communication with interested parties on the subject of proposed regulations is essential. Such parties are usually in the best position to provide much of the specific information necessary for wise rule formulation. An opportunity for interested persons to inform appropriate administrators of facts, views, or arguments that they consider relevant to any proposed rule is, therefore, necessary for the sound operation of government.[4]

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[1] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 102 (1941) [hereinafter cited as ATTORNEY GENERAL'S FINAL REPORT].

[2] *Id.* 103, *quoted in* S. Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946) [hereinafter cited as S. Doc. No. 248] (justification for enacting § 4 of Administrative Procedure Act). S. Doc. No. 248 is the official legislative history of the APA and conveniently collects working papers and committee reports.

[3] ATTORNEY GENERAL'S FINAL REPORT 102.

Other reasons also dictate our government's need to involve interested parties in the formulation of rules by affording them the opportunities just noted. Thirty years ago it was asserted that "our conception of administrative responsibility is undergoing profound change. The emphasis is shifting; instead of [public] subserviency to arbitrary will [of administrators] we require [administrative] responsiveness to commonly felt needs and wants." [5] When interested parties have a chance to communicate facts and opinions bearing on proposed regulations to the appropriate authorities, the latter are likely to become more responsive to the problems of those involved than would otherwise be the case.

Public involvement in the formulation of rules is also an excellent way to implement the ideal of participatory democracy. If we assure interested parties an opportunity to influence the decision-makers by communicating with them, public involvment in the rulemaking process will expand, making the process more representative. Public participation in rulemaking may be particularly helpful when an agency promulgates an unpopular rule. Dissenters may be less likely to sabotage a rule in an active way if they have had an adequate opportunity to present their objections prior to its promulgation. Moreover, the failure of officials to secure views from the relevant public before regulations are issued may result in a lack of administrative preparation for certain problems that could arise from those rules' application, or the community's reaction to them.

Parties affected by administrative rules have a distinct personal interest in how they are made. An adequate opportunity to present relevant information to appropriate officials is one of the most important tools with which individuals can defend themselves against an exercise of rulemaking power that may be detrimental to their interests. Political realities may make legislative modification of unwise regulations hopeless; and the breadth of agency discretion may make judicial assaults unsuccessful. In cases of this sort, an opportunity for affected parties to communicate their views on proposed rules to the appropriate officials may be the only meaningful chance those parties will have to protect their interests against rules they consider unwise.

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[4] Recognition of the value of such public participation in government policy formulation was reflected in the May, 1969, action of the President's Task Force on Oil Import Quota Controls. Although not required to do so, the Task Force decided to assure that all relevant information and opinion on the question of oil import quota controls was before it by inviting interested persons to "submit concise written comments to the task force on whether oil imports should remain subject to reduction and, if so, to what degree and by what means." 34 Fed. Reg. 7264 (1969). The Attorney General's Committee on Administrative Procedure made a similar broad solicitation of views in 1940. ATTORNEY GENERAL'S FINAL REPORT 4–5.

[5] Friedrich, *Public Policy and the Nature of Administrative Responsibility*, in PUBLIC ADMINISTRATION AND POLICY 241 (P. Woll ed. 1966).

It should be clear that the public participation in rulemaking under discussion here is only directed at assuring an adequate opportunity for interested persons to communicate their views, information, and the like, to the relevant government officials. There is no intention to transfer the actual decision-making power with respect to rules to the interested public. Meaningful public participation in the formulation of administrative rules does not "in any way affect the authority of the agency or its discretion. All that is required is the giving of . . . an opportunity to interested persons to present their views concerning the proposed rule. The department or agency may give such consideration to the views presented as it deems warranted under the facts." [6]

To be meaningful, the opportunity to communicate with respect to proposed rules need not necessarily require oral hearings; indeed, written submissions will usually be adequate. Such an assurance of public participation in rulemaking does require, however, that the public be given timely notice of all proposed rulemaking and that an indication of the subject matter of the rulemaking in question be included. Otherwise, the public participation which results will probably

> be diffuse and of little real value either to the participating parties or to the agency . . . . Hence, sound practice dictates that ordinary [notice of such rulemaking and opportunities to participate] be accompanied by tentative drafts of the regulations being considered or by a *precise* statement of the subjects which it is expected may ultimately be touched.[7]

In addition to general notice of proposed regulations, adequate public participation in the rulemaking process requires that the exact terms of a new rule be published a reasonable time before its effective date. Otherwise, even if the public has participated in the preliminary formulation of a rule, the final details of its exact text may not be known to interested parties until the date of its promulgation as law. A procedure for delayed effectiveness is, therefore, necessary "to correct error or oversight in regulations before, rather than after, they become effective."[8] Such a safeguard procedure will "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt."[9]

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[6] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 160 (1955) [hereinafter cited as TASK FORCE REPORT].

[7] ATTORNEY GENERAL'S FINAL REPORT 108 (emphasis added).

Meaningful public participation in the rulemaking process would also seem to demand recognition of another administrative obligation and private right. Interested parties should be able, on their own motion, to induce a reasoned consideration of the propriety of the issuance, amendment, or repeal of a rule, by those authorized to make and modify rules. Absent this ability of the concerned public, administrators satisfied with the status quo might neglect to reexamine their position in light of any new views or information that becomes available. A right to petition for the issuance, amendment, or repeal of a rule and to receive a reasoned response thereto is not only valuable as a protection for private interests, but is also necessary to assure sound government. It forces agencies to reconsider their position with respect to existing or proposed rules in light of petitioners' objections, therefore making it likely that wiser policies will be pursued with respect to those rules than would otherwise be the case.

At some point, however, requirements of the sort discussed above may directly conflict with other values important to the operation of our polity. More specifically, there is an obvious need to conduct our government efficiently, expeditiously, effectively, and inexpensively. No rulemaking scheme may be considered acceptable unless it fairly reconciles these latter values with the societal interest in maximizing public participation in the development of administrative regulations. Imposition of requirements on the rulemaking process that unduly fetter agency action, or frustrate its purposes, would obviously strike an inadequate balance between the competing values involved. Yet the interest in involving interested parties in rulemaking is not so slight that it should be set aside solely on the basis of minor inconvenience or expense to government.

Section 4 of the Federal Administrative Procedure Act

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[8] ATTORNEY GENERAL'S FINAL REPORT 114.

[9] S. Doc. No. 248, at 201, 259.

(APA), now 5 U.S.C. § 553, attempts to reconcile this conflict between the need for public participation in rulemaking and the need for efficient, expeditious, effective, and inexpensive government. That provision states:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
>
> (1) a military or foreign affairs function of the United States; or
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
>
> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.
>
> (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Another provision of the APA[10] states that for these purposes

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, inter-

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[10] Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4) (Supp. IV, 1969). On the definition of "rule" see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958).

> pret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

The specific question to be examined here is whether section 553 satisfactorily accommodates the competing interests involved insofar as it unqualifiedlv exempts from the required rulemaking procedures of that provision *all* rulemaking "relating to . . . public property, loans, grants, benefits, or contracts." Because of the strong societal interests in assuring public participation in the rulemaking process, these section 553(a)(2) exemptions may be justified only insofar as they are narrowly tailored to preserve those other societal interests conflicting with the need for public involvement in the process, in a degree related to their comparative importance. That is, exemptions from an obligation imposed on agencies to implement public participation in rulemaking should be countenanced only to the extent to which they are absolutely necessary to preserve other values of equal or greater importance.

The inquiry here is intentionally limited to the section 553(a)(2) exemptions for "public property, loans, grants, benefits, or contracts." The present study will not consider the merits of any other exemptions contained in section 553. It will not, for example, consider the section 553(b)(A) and section 553(d)(2) exemptions for interpretive rules and statements of policy, the section 553(a)(1) exemptions for "military or foreign affairs function[s]," or the section 553(a)(2) exemption for "a matter relating to agency management or personnel."

There are several reasons why this study will not even consider the other section 553(a) exemptions just noted. The latter exemptions involve problems that are distinctly separable from, and more difficult to resolve satisfactorily than, those associated with the former exemptions. The interests underlying the inclusion of the other exemptions in the statute are severable in most respects from the interests said to justify the former. There also seems to be greater demand for abolition of the "public property, loans, grants, benefits, or contracts" exemption than for the other unqualified section 553(a) exemptions. Moreover, there is a greater willingness among the government agencies involved to suffer a modification of these (a)(2) exemptions than the others. Practically speaking, the military, foreign affairs, and agency management exemptions seem to be more impervious to change than the section 553(a)(2) exemptions to be examined here. Lastly, the exemptions on which this Article will concentrate can analytically be considered as a unit, separate from the others; and of all the section 553(a) exemptions, they may do the greatest damage with the least justification.

Of course, other exemptions contained in section 553 will be scrutinized to the extent that this becomes necessary to analyze properly the problem under consideration. The above discussion is in no way meant to suggest that the exemptions for the military, foreign affairs, and agency management functions are unrelated to, or completely separable from, those section 553(a)(2) provisions being examined here. Indeed, if reform is required in this area, it may be difficult in the long run without some modification of all these exemptions. For example, modification or elimination of the contracts exemption in section 553(a)(2), should that prove desirable, would still leave virtually all contracts for military procurement excluded from section 553 under the military functions exemption of subsection (a)(1). And elimination of the public property exemption would still leave rulemaking relating to the largest portion of federal property exempt, because it is owned by the Department of Defense and used in the performance of military functions.

However, an evaluation of the section 553 exemptions may be made most satisfactorily in steps. If the "public property, loans, grants, benefits, or contracts" exemption can be adequately dealt with here, future studies may more easily be able to move on to a dispassionate appraisal of the desirability of the other section 553 exemptions. The current study will, therefore, deal only with these exemptions which will be referred to throughout the remainder of this Article as the section 553(a)(2) or subsection (a)(2) exemptions.

II. The Requirements of Section 553(b)–(e)

Subsections (b)–(e) of section 553 attempt to assure that the public has an opportunity to participate meaningfully in the rulemaking process. The provisions of section 553(b) require that an agency contemplating the issuance of a substantive rule [11] must publish a notice in the *Federal Register* of the proposed rulemaking indicating the time, place, and nature of the public rulemaking proceeding, and a statement of the specific legal authority under which the rule is proposed.[12] In addition, the agency must include either the actual provisions of the proposed rule, or a summary statement of the subjects or issues to which they relate. The notice involved "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto" as they are entitled to do under the following subsection of section 553.[13] The agency has the option of dispensing with such publication in the *Federal Register* only if the notice requirement described above is functionally satisfied because all "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."

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[11] Section 553(b)(A) expressly exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice requirements. *See* U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 (1947) [hereinafter cited as Attorney General's Manual], stating that this restricts the application of the notice and participation requirements in what is now §§ 553(b)–(c) "to substantive rules issued pursuant to statutory authority" (citing a portion of the statute's legislative history, S. Doc. No. 248, at 19).

After giving notice, agencies are required by section 553(c) to accord interested persons a chance to participate in the particular rulemaking involved "through submission of written data, views, or arguments with or without opportunity for oral presentation." In practice, the precise procedure actually utilized

> may take a variety of form: informal hearings (with or without a stenographic transcript), conferences, consultation with industry committees, submission of written views, or any combination of these. . . . In each case, the selection of the procedure to be followed will depend largely upon the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.[14]

It must be reiterated, however, that according to the statute, interested persons must at the very minimum be afforded an opportunity to submit "written data, views, or arguments with or without opportunity for oral presentation." [15]

An agency must review the materials presented to it in the course of such public rulemaking proceedings and include in any rules resulting from this process a statement of their basis and purpose.[16] Nevertheless, it is clear that the statute "does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rulemaking proceedings." [17] However, where statutes require a particular kind of rule to "be made on the record after an opportunity for an agency hearing" other provisions of the Administrative Procedure Act outlining more formal hearing requirements will govern that proceeding instead of these informal section 553 provisions; [18] and in such a case, the rule must be made on the formal "record" so adduced.

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[12] The House Report on the APA stated that "[t]he required specification of legal authority must be done with particularity. Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section." S. Doc. No. 248, at 258.

[13] S. Doc. No. 248, at 200, 258. *See also* California Citizens Band Ass'n. v. United States, 375 F.2d 43, 48–49 (9th Cir. 1967), stating that the section requiring that notice be given concerning contents of proposed rules of the administrative agency "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule. . . . A notice of rulemaking is sufficient if it provides a description of subjects and issues involved."

[14] Attorney General's Manual 31. The legislative history clearly indicates that § 553(c) "leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data . . . ." S. Doc. No. 248, at 19.

[15] S. Doc. No. 248, at 200, 259.

Neither the advance notice nor public participation requirements outlined above apply in those cases where "the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The provision just quoted will be discussed in more detail later in this Article.

Two other subsections of section 553 impose conditions with respect to rules and rulemaking that are operative even if the notice and public participation requirements of section 553(b)–(c) are not applicable because they come within the "good cause" exception just noted. Section 553(e) insists that every agency give interested persons "the right to petition for the issuance, amendment, or repeal of a rule." The mere filing of such a petition does not, however, require an agency to engage in a public rulemaking proceeding on that subject.[19] The agency must act on the petition in accordance with its procedures promulgated under other provisions of the APA,[20] and may grant such a petition, undertake public rulemaking proceedings in relation to it, or deny the petition. The chief practical significance of this express right to petition requirement seems to be that the denial of a section 553(e) petition is governed by the provisions of section 555(e), which require a prompt notice of the denial "accompanied by a brief statement of the grounds. . . ." [21]

A further requirement may be found in section 553(d) relating to the time period that agencies must allow between the promulgation of a substantive rule and its effective date. It states that the required publication of a substantive rule under section 552, the freedom of information provision of the Act, must be made at least thirty days prior to the effective date.[22] The thirty day notice provision, like the right to petition an agency for the issuance, amendment, or repeal of a rule, is applicable even if the public rulemaking procedures of section 553(b)-(c) are not, because they are found to be "impracticable, unnecessary, or contrary to the public interest." [23] Exceptions are provided to this last noted time requirement, however, in those situations where the substantive rule "grants or recognizes an exemption or relieves a restriction." An exemption is also provided where the agency decides, "for good cause found and published with the rule," that such a minimum thirty day period between the time of a rule's publication and its taking effect is unnecessary. This last exemption will also be discussed in more detail later in the Article.

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[16] "The agency must analyze and consider all relevant matter presented. The required statement of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule." *Id.* at 201, 259.

[17] ATTORNEY GENERAL'S MANUAL 31 citing *Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary,* 77th Cong., 1st Sess., ser. 1, pt. 3, at 444 (1941) [hereinafter cited as *1941 Hearings*], which is limited authority for the otherwise sound conclusion of the MANUAL on this point because the testimony referred to is that of only a single person, Commissioner C. B. Aitchison of the ICC).

[18] 5 U.S.C. §§ 556–557 (Supp. IV, 1969).

[19] ATTORNEY GENERAL'S MANUAL 38; S. Doc. No. 248, at 201, 260.

[20] 5 U.S.C. §§ 552(a)(1) (B)–(C) (Supp. IV, 1969); S. Doc. No. 248, at 260.

[21] ATTORNEY GENERAL'S MANUAL 39 (citing S. Doc. No. 248, at 201, 260).

III. SECTION 553 (b)-(e) IN RELATION TO THE SUBSECTION (a) EXEMPTIONS

The exemptions contained in section 553(a) for rulemaking involving "a military or foreign affairs function," rulemaking "relating to agency management or personnel," and rulemaking relating to "public property, loans, grants, benefits, or contracts" operate to exclude entirely, and without qualification, all rulemaking in these categories from every provision of subsections 553(b)-(e). Consequently, none of the requirements imposed on administrative agencies by the provisions previously discussed are applicable to these specifically exempted classes of rulemaking. This means, for example, that unless some other statute specifically directs the contrary,[24] agencies making rules relating to "public property, loans, grants, benefits, or contracts" are *never*, under any circumstances, obliged as a matter of law to do any of the following things: (1) publish notice of proposed rulemaking in the *Federal Register* according to specifications of section 553 (b); (2) give interested people a chance to participate in the formulation of rules through submission of views or data, according to the terms of section 553(c); (3) give interested persons "the right to petition for issuance, amendment, or repeal of a rule," according to the terms of section 553(e); or (4) publish substantive rules at least thirty days before their effective date as required by section 553(d).[25] The blanket language of section 553(a) makes no allowance whatsoever for the possibility that certain rulemaking within its terms may need to be exempted from some of the subsection (b)–(e) requirements and not from others. Similarly, this provision does not recognize that certain rulemaking within its terms may need exemption from all of those requirements and other such rulemaking from none of them.

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[22] *See* ATTORNEY GENERAL'S MANUAL 36, stating that "[t]he discussion on section . . . [553(d)] in the reports of both the Senate and House Committees on the Judiciary makes clear that the phrase 'The required publication or service of any substantive rule' does not relate back or refer to the publication of general notice of proposed rulemaking required by [§ 553(b)]; rather it is a requirement that substantive rules which must be published in the Federal Register [*see* § 553(a)(1)(D)] shall be so published at least thirty days prior to their effective date." The language of § 553(c) does, of course, lend itself more readily to the opposite construction, but it seems to have been construed only in the manner suggested by the ATTORNEY GENERAL'S MANUAL. *See also* Landsen v. Hart, 168 F.2d 409 (7th Cir. 1948); TASK FORCE REPORT 160. The legislative history referred to may be found in S. Doc. No. 248, at 201, 259.

[23] S. Doc. No. 248, at 200–01, 259.

[24] Another statute will control if it directs that certain kinds of rules relating, for example, to loans, grants, or benefits be made in accordance with the requirements of §§ 553(b)-(e). *See* 5 U.S.C. § 559 (Supp. IV, 1969). The following statement made during the Congressional hearings on the APA supports this conclusion: "These exceptions would not, of course, relieve any agency from requirements imposed by other statutes." S. Doc. No. 248, at 199.

The exemptions currently found in section 553(a) obviously proceed upon the assumption that a sweeping judgment can be made concerning those categories of subjects. The policies favoring public participation in rulemaking are outweighed by the consequences of subjecting these particular classes of rulemaking to the requirements of subsections (b)–(e), or the consequences of utilizing a more flexible approach to determine whether, in any given case, they should be subjected to those requirements. The validity of this assumption must be carefully examined and tested with respect to the exemptions for "public property, loans, grants, benefits, or contracts."

It should be stressed that in those cases where rulemaking is excepted from the requirements of section 553 by subsection (a), agencies may use any rulemaking procedure they please, with or without public participation, unless another statute specifies the contrary. The legislative history of the Administrative Procedure Act clearly indicates, however, that none of the blanket introductory exceptions from the section "is to be taken as encouraging agencies not to adopt voluntary public rule making procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule making procedures they will adopt in a given situation within their terms." [26]

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[25] ATTORNEY GENERAL'S MANUAL 39; S. Doc. No. 248, at 199, 257.

[26] S. Doc. No. 248, at 199, 257.

However, the fact is that most agencies do not usually exercise their discretion to follow the requirements of section 533 (b)–(e) when they are not bound to do so. Consider agency practice with respect to that rulemaking of primary concern here—rulemaking relating to "public property, loans, grants, benefits, or contracts." A survey prepared for this study, and distributed under the auspices of the Rulemaking Committee of the Administrative Conference of the United States during the summer of 1969, asked each federal agency:

> Does your department or agency follow the procedures specified by § 553 (b)–(e) for any rulemaking exempted from those provisions by § 553 (a)(1)–(2)? If it does, list the particular kinds of rulemaking exempted by § 553(a)(1)–(2) for which your department or agency has voluntarily chosen to follow some or all of the procedures specified by § 553(b)–(e). Explain. Also list the frequency with which it voluntarily follows those requirements for such exempted rulemaking, and the specific circumstances under which it does so.

Responses to this question by those agencies reporting that they make rules relating to "public property, loans, grants, benefits, or contracts"[27] indicate a pattern. Rulemaking excluded by this part of subsection (a)(2) from the mandatory terms of section 553(b)–(e) usually will not be conducted according to those procedures. That is, most responding agencies indicated that they do not normally follow the provisions of section 553(b)–(e) when their rulemaking is excepted from them by subsection (a)(2).[28] And while a number of agencies indicated that they engaged in a contrary practice with respect to such rulemaking, most of these admitted to some inconsistency in this regard.[29]

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[27] The following agencies responded to the survey questionnaire prior to September 8, 1969, and indicated that they made rules relating to "public property, loans, grants, benefits, or contracts": Department of the Treasury; Small Business Administration; Department of Agriculture; Department of Defense; Veterans' Administration; Post Office Department; Department of Commerce; Atomic Energy Commission; Department of Transportation; Department of Labor; the Department of Health, Education and Welfare; Office of Economic Opportunity; and the National Aeronautics and Space Administration. It is the responses of the above agencies that will be discussed in this study [hereinafter cited as 1969 Survey].

[28] *See, e.g.*, the following responses to the 1969 Survey question. The Atomic Energy Commission reported that "The A.E.C. does not follow the procedures specified by 5 U.S.C. 553(b)–(c) for the rulemaking . . . which is exempted from such procedures." The Small Business Administration reported that "S.B.A. does not, as a general rule, follow the requirements of notice of proposed rulemaking and public participation for programs exempt from section 553, although some qualifying comment may be appropriate." The Department of Health, Education and Welfare reported that "the Department has followed the procedures specified by 5 U.S.C. 553(b)–(e) for rulemaking exempted from those provisions by § 553(a)(2), on occasion. . . ." The Department of Defense and the Veterans' Administration answered "No," and the Department of Agriculture's various divisions indicated that they rarely, if ever, followed usual §§ 553(b)–(e) procedures in cases of rulemaking exempted by § 553(a)(2).

[29] *See, e.g.*, the following responses to the 1969 Survey question. The Post Office Department stated that "The Department normally follows the procedures of sec. 553(b)–(e) for any rulemaking leading to the adoption of regulations relating to domestic mail service when it is considered that the regulation may have a substantial or adverse effect on the public. . . . By

Not only do agencies generally fail to follow the procedures of section 553(b)–(e) in most cases where they are not required to do so, but the public rulemaking procedures actually utilized by administrators in the excepted situations are frequently inadequate substitutes for those found in section 553(b)–(e).[30] The survey prepared for this study asked reporting agencies:

> What rulemaking procedures does your department or agency use in those cases where rulemaking is exempted by § 553 (a)(1)–(2) from the requirements of § 553(b)–(e) and it does not choose, in its discretion, to follow § 553(b)–(e)? Be as specific as possible. Include a concrete example of each of the different kinds of rulemaking procedures utilized by your department or agency when it does not follow § 553(b)–(e) because the rulemaking involved is exempted by § 553(b)(1)–(2).

Responses indicate that substitute procedures are not always consistent and do not, in many cases, assure adequate notice to affected parties and a sufficient opportunity for their participation. In some cases, the agencies may simply determine the rule they think appropriate and promulgate it, without first notifying or consulting with anyone outside the Government. In other such cases, agencies give notice to, and engage in informal consultation with, whomever they happen to think appropriate under the circumstances.[31] The actual procedures utilized in those cases

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way of illustration it was undertaken on twelve occasions during 1968." However, much rulemaking relating to Post Office contracts and the management of Post Office property seems not to be subjected to usual § 553 requirements. The Department of Transportation stated that "With respect to Parts 151, 153, 155, 159, 165, 167, and 169 of title 14, C.F.R. . . . the Department does follow all of the section 553 rulemaking procedures, even though exempted therefrom under 553(a)(2), except for minor or technical amendments." However, this means that it does not follow § 553(b)–(e) with respect to rulemaking relating to other Department programs which it lists as exempted by the § 553(a)(2) exceptions under study here. The Department of Commerce reported that some of its divisions, like the Office of State Technical Services, usually follow § 553(b)–(e) in cases exempted by subsection (a)(2); while others, like the Domestic and International Business Division, do not. The Department of Labor also indicated that it usually follows §§ 553(b)–(e) with respect to rulemaking of general applicability.

[30] Imposition of the §§ 553(b)–(e) requirements on rulemaking currently excluded from the ambit of those provisions by § 553(a)(2) has been opposed by some agencies on the grounds that it is unnecessary as applied to them. They maintain that substitute procedures actually utilized assure adequate notice and participation. *See e.g., Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 2d Sess. 20–22 (General Services Administration) and 494–95 (Dept. of Defense) (1964) [hereinafter cited as *S. 1663 Hearings*]. *See also Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 246, 379 (1967) (Veterans' Administration, Dept. of Interior) [hereinafter cited as *S. 518 Hearings*]. These are not, of course, disinterested judgments, and their validity is, therefore, disputable.

[31] *See, e.g.,* the following responses to the 1969 Survey question. The Small Business Administration reported that "parts 112 and 113 Nondiscrimination in Financial Assistance Programs of S.B.A., were prepared internally, but cleared with the Department of Justice. . . . Rules setting forth the policies, proceedings, and requirements for loan, procurement, and other assistance programs are also prepared internally. But in many cases the programs will require or be substantially fostered by contribution from non-governmental sources." The Post Office noted that "when statutory procedures are not used the Department develops its regulations through informal discussions with those to be affected, by negotiation, or by internal

where agencies are not required to follow section 553 because of subsection (a)(2) may, therefore, often result in a failure to invite interested persons to participate in the formulation of a rule.[32]

Some agencies do utilize substitute procedures that in fact assure adequate notice to affected parties, and a sufficient opportunity for their participation. In a number of cases, those substitute procedures have been specially instituted to cure, at least partially, the failure of section 553 to cover rulemaking relating to "public property, loans, grants, benefits, or contracts." Chief among these is a procedure announced by the Bureau of the Budget in *Circular No. A–85* on June 28, 1967. This document applies to most "regulations and revisions thereof which implement a Federal Assistance Program that includes among its eligible recipients state or local governments or quasi-public agencies." [33] It provides that an agency shall give the Advisory Council on Intergovernmental Relations (ACIR) a copy of each such proposed regulation at least 45 days before it is to be promulgated. If legal or other circumstances make this impossible, the agency is to advise the ACIR of this fact, and at least provide it with a summary or abstract in lieu of the regulation.[34] The ACIR is then to transmit copies of such materials to a number of specific state and local government associations such as the National Governor's Conference, Council of State Governments, and the United States Conference of Mayors, who will then have up to three

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decision-making processes." The Department of Agriculture's Rural Electrification Agency reported that "R.E.A. Bulletins are formulated by staff members responsible for the program aspects involved in the proposed bulletin with final review and approval by an Assistant Administrator, Deputy Administrator, or the Administrator. Within the discretion of R.E.A., drafts of bulletins may be discussed informally with representatives of borrowers, contractors, engineers, and other parties interested in R.E.A. programs prior to issuance." The Production Stabilization Division of the Department of Agriculture noted that "almost without exception, the final regulation is published in the Federal Register without prior notice . . . ." The same Department also stated that new rules "are prepared by the Farmers Home Administration National Office, with the advice and assistance of the Office of the General Counsel of this Department. . . . Field employees are in daily contact with Farmers Home Administration borrowers and other recipients of Farmers Home Administration assistance and are fully cognizant of their needs and views. Field employees are many times called upon to serve on committee or submit their comments in connection with the development or revision of F.H.A. instructions of major significance." *See also* responses to a somewhat similar survey question supporting the same point in Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 547, nn. 41 and 42 (1969) [hereinafter cited as Bonfield].

[32] Officials of a number of major organizations purporting to represent some segment of the poor have complained, for example, of inadequate notice with respect to proposed rules of interest to them, and of many agencies' lack of interest in ascertaining their views in relation to rulemaking affecting the poor. A number of federal agencies have also tactily admitted that current rulemaking procedures utilized in some rulemaking relating to the subjects exempted by § 553(a) have been inadequate to assure sufficient representation for the poor in federal rulemaking. *See* Bonfield 518–19.

[33] B.O.B. Circular No. A–85, § 4 (June 28, 1967).

[34] *Id.* § 5(a).

weeks within which to comment to the federal agency involved on the proposed regulation.[35]

As helpful as *BOB Circular A–85* may be, it is no substitute for the more broadly applicable requirements of section 553(b)–(e). The protections of the former scheme do not, for example, apply to rulemaking relating to grants made exclusively to private parties or organizations. Moreover, *Circular A–85* fails to assure a very large number of "interested" or "affected" persons notice of, or an adequate opportunity to participate in, rulemaking of the type covered by that document for two reasons. In the first place, the document assumes that the procedure contained therein will only apply to that rulemaking "significant enough to be put through the consultation arrangements," leaving it to the discretion of the agencies to decide which rulemaking is significant. The BOB effort does not even supply a standard to measure what is to be considered "significant" for this purpose. Secondly, the *Circular* in question does not assure many interested persons notice and an opportunity to participate in the regulation making within its terms. Rather, it provides notice and a chance to comment only to certain state and local government associations and, through them, to their members. As the ultimate beneficiaries of particular federal programs granting aid to state and local governments, many classes or groups of citizens have a vital interest in regulations relating to these programs. Their interests, on occasion, may be different from, or even in opposition to, the interests of the political heads of state and local governments whose participation in rulemaking is sought to be protected by this scheme. Yet interested citizens are not assured advance notice or an opportunty to participate in such rulemaking relating to federal grants by *BOB Circular A–85*.

In the end it must be reiterated that the exemption for "public property, loans, grants, benefits, or contracts" results in a situation in which interested persons are frequently denied notice of, and an adequate opportunity to participate in, rulemaking of concern to them. To the extent this occurs in any case without a justification sufficient to warrant that result, it should not be tolerated. As noted previously, the reasons supporting the section 553(b) (e) requirements for public participation in rulemaking are very compelling. The potential damage to sound government policy formulation and private rights is great in any case where such participation is not assured. The scope and importance of the subsection (a)(2) exceptions, and the reasons advanced for their existence must, therefore, be examined with special care.

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[35] *Id.* § 5(c).

IV. THE SECTION 553 (a)(2) EXEMPTIONS: THEIR SCOPE AND PRACTICAL IMPORTANCE

A. Generally

A few general comments should be made about the linguistic form in which the subsection (a)(2) exemptions are cast. By their terms, these exclusions only apply "to the extent that there is involved" rulemaking that is related to "public property, loans, grants, benefits, or contracts." The legislative history emphasizes the "to the extent" language, stating that these exemptions "apply only 'to the extent' that the excepted subject matter is clearly and directly involved." [36] This suggests that where an agency makes some rules coming within the introductory exemptions and some rules that do not, it may ignore the procedures of subsections 553 (b)–(e) in the former cases but must follow them in the latter cases. Even a single scheme of proposed regulations must abide by this principle if it is practically divisible into particular provisions which involve excluded functions and ones that do not. In the report of the Senate Committee on the bill that was to become the Administrative Procedure Act, the Committee stated that:

> [I]t has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classification and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions.[37]

Every federal agency is exempted from the usual section 553 requirements to the extent that they perform the listed functions. Drafters of the statute stated that "[w]here one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." [38] Moreover, the purpose or effect of the rules relating to any of the excepted subjects is irrelevant since all such regulation making is excepted from section 553 by subsection (a)(2). Similarly, the type or quantity of public property involved, or the use to which it is put, and the subject or reason for the loans, grants, benefits, or contracts are also immaterial for purposes of this all-encompassing exemption.

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[36] S. Doc. No. 248, at 257. *See also id.* 199.

[37] *Id.* 191.

[38] *Id.* 250.

On the other hand, rulemaking is arguably not exempt under subsection (a)(2) unless it "clearly and directly" relates to the excluded subject matter.[39] This wording suggests that rulemaking only indirectly or tangentially related to the exempted subjects is not to be treated as within the exclusions, and that unclear, close, or doubtful cases should be treated as outside the exemption. Although the lack of the emphatic word "clearly" in the Senate Report somewhat dilutes this argument, there are strong reasons to construe the introductory exceptions narrowly. Most important is the fact that the subsection (a)(2) exclusions are in the form of broad, unqualified exceptions to provisions implementing a very important general governmental policy favoring public participation in rulemaking, and those usually operative provisions individually contain special detailed exemptions for peculiar cases. Moreover, a principal reason for the enactment of the APA was to secure some standardization of administrative procedure.[40] Exceptions from any of its provisions should, therefore, usually be construed narrowly in order to achieve that result.

Nevertheless, the language of the section 553(a)(2) exemptions is very broad. Not only are the listed subjects that are excluded specified in terms easily susceptible to wide application, but to be exempted the rulemaking in question must only involve "a matter relating to" the specified subjects. An attempt to minimize the significance of the "relating to" language in subsection (a)(2) of the statute can be made by arguing that there is little if any difference between rulemaking where there is "involved" a certain stipulated matter and rulemaking where there is "involved a matter relating to" that stipulated matter. Since there is ordinarily a difference in meaning between these phrases, and the inclusion of the phrase "relating to" in subsection (a)(2) is unnecessary except as a contrast to the subsection in which it is omitted, a conclusion that the usage only constitutes a choice of style and does not affect content seems difficult to accept.

The following discussion will attempt to state the main thrust of each of the section 553(a)(2) exemptions, and provide some illustrative examples of rulemaking they are deemed to exclude.[41] And assessment will also be made of the importance of the rulemaking excluded by subsection (a)(2) from the usual requirements of section 553, and the urgency and care with which these exemptions must be examined in order to ascertain whether they are justified.

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[39] *Id.* 199, 257. "Directly" is the language from the Senate Report on the APA and "clearly and directly" from the House Report.

[40] McFarland, *Analysis of the Federal Administrative Procedure Act*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 22 (G. Warren ed. 1947). *See also* S. Doc. No. 248, at 187, 249.

No attempt will be made in the following discussion to furnish any mutually exclusive definition of each of the several terms "public property, loans, grants, benefits, or contracts" used in section 553 (a)(2). Rather, as noted above, the main thrust of each term as commonly understood in everyday government parlance will be described. There are two reasons why no effort will be made to delineate precisely each term from every other term. First, such an effort seems unnecessary for present purposes. If rulemaking comes within the ambit of any one of these terms, it is exempt from usual rulemaking procedures under subsection (a)(2). Second, five neat and mutually exclusive categories cannot easily be drawn from the above terms. Upon close examination, each of them overlaps at some point with one or more of the other of these exemptions. A particular instance or class of rulemaking may well fit within two, three, or even more of the above categories. Many agencies acknowledged this overlap between the terms "public property, loans, grants, benefits, or contracts" in responses to the survey prepared for this study. A very large number of agencies listed rulemaking which they considered to be exempted from section 553 by subsection (a)(2) as fitting within two or more of the terms listed in that exclusion.[42]

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[41] Data with respect to the way in which administrators actually construe these exemptions in their every day affairs has been obtained from the survey questionnaire distributed as part of this study to all federal agencies. One question asked was:

> What rulemaking does your department or agency engage in that is exempted from the requirements of §§ 553(b)-(e) by §§ 553(a) (1)-(2)? Be as specific as possible by listing the particular programs you administer whose rulemaking is exempt, and for each such program the particular part or parts of §§ 553(a) (1)-(2) under which it is exempted. Where some rulemaking for a particular program is exempt and some are not, indicate which kinds of rulemaking for that program are exempt and which kinds are not. Very briefly describe the purpose of each such exempted or partially-exempted program and provide citations to the statutes under which it is administered.

Most of the illustrations of exempted rulemaking used in the following section are drawn from the responses to this questionnaire.

[42] The extent to which the terms used in subsection (a)(2) may overlap can best be understood by the following examples. A loan of federal funds might be deemed to involve "public property" as well as "loans" because the money being loaned is property of the national government. The same may be true of grants of federal monies and benefits paid out of governmental resources. A loan also may be considered within the "contracts" exemption because the government lends money in consideration of the borrower's promise to return it. The same may be said of grants because the United States usually gives them on certain conditions which the grantee accepts when he voluntarily takes and uses the grant. A benefit might also be deemed to fit within the "contracts" exemption as well as that for "benefits" when it is given because of previous financial contributions which were made with the understanding

B. Public Property

Rulemaking involving any "matter relating to . . . public property" is the first section 553(a)(2) exemption of concern to this study. The 1947 *Attorney General's Manual on Administrative Procedure* stated that this exclusion "embraces rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. . . . The term 'public property' includes property held by the United States in trust or as guardian; *e.g.*, Indian property."[43] The legislative history of the APA directly supports this assumption.[44] Consequently, the term "public property" would seem to have a broad content, exempting from section 553 rules relating to any form of property held by the United States in almost any capacity.

Although an argument has been made that the "public property" exemption only applies to property held by the United States in a "proprietary" capacity,[45] such a position has very little to recommend it. Aside from the difficulty in distinguishing a "proprietary" capacity from other capacities because the content of that term is illusory at best,[46] neither the language nor legislative history of the Act support any such limitation. The little evidence mustered to support this view can be easily explained on grounds other than an intent to achieve that result.[47]

The areas into which it has been argued that the "public property" exemption should reach are considerably more varied than one might expect. For example, a question arose over whether regulations concerning wild birds under the Migratory Bird Treaty Act were subject to what is now section 553; that is, were wild birds "public property" so that regulations relating to

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that subsequent benefits would be paid. Similarly, rulemaking relating to "grants" and rulemaking relating to "benefits" may overlap. Aside from any initial difficulties in distinguishing those terms, the United States frequently gives grants to the states to finance benefit programs as, for example, in the Aid to Families with Dependent Children Program. Federal rulemaking relating to that program may well relate both to "grants" and "benefits" since the benefits ultimately paid to the recipients under the program may well be considered federal benefits for purposes of § 553(a)(2).

[43] ATTORNEY GENERAL'S MANUAL 27.

[44] S. Doc. No. 248, at 257.

[45] Wheatley, *A Study of Administrative Procedures—The Department of Interior*, 43 GEO. L.J. 166, 177–80 (1955). The floor manager of the APA in the House stated that "the exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts." S. Doc. No. 24, at 358. *See also id.* 199 (stating that the § 553(a)(2) exemptions deal with "proprietary matters").

[46] Proprietary is defined as "held as the property of a private owner; relating or belonging to a proprietor." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1819 (1966). *See also* BLACK'S LAW DICTIONARY 1384 (rev. 4th ed. 1968).

[47] The legislative history relied on was undoubtedly intended to constitute simply an explanation of why the public property exclusion was included, or to serve as a shorthand means of designating these exclusions, and in no way intended as a limitation upon them.

them were exempt from the usual rulemaking requirements? After noting that at common law wild animals are the property of the state in which they are found, the Department of Interior in a memorandum opinion stated:

> As have been shown, the cases which speak of title to or ownership of wild animals or birds placed the title or ownership in the states, not in the Federal Government. The exception of "public property" from the purview of [APA] section 4 extends only to property of the United States. Consequently, the exception would not cover rules regulating the taking of wild game on lands other than those of the Government.[48]

The Post Office has also been very much involved with the "public property" exemption. In *Doehla Greeting Cards, Inc.* v. *Summerfield*,[49] plaintiff challenged an increase in postal rates. One of his grounds for the suit was that the Interstate Commerce Commission had not held a hearing in conformance with usual procedures prior to giving its required consent to the postal rate increase. The court replied that "the hearing provisions of the Administrative Procedure Act . . . § 4 . . . do not apply, as mail rates are within the second exception, 'any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts'." [50] While the court was not clear as to which of the particular exceptions in section 553(a)(2) applied to the setting of mail rates, it was probably referring to the "public property" exemption. Many cases have suggested that the United States has a "property right" and a "proprietary interest" in the postal service.[51]

The cases which would support such a theory could be distinguished from the present question because they were concerned with the reach of federal power to protect, foster, and regulate the postal system rather than the extent to which postal authorities were exempted from the usual public rulemaking requirements. Nevertheless, distinctions of this kind seem to be considered irrelevant. At the time of the APA's adoption the Assistant Solicitor General of the United States informed the Solicitor of the Post Office Department that:

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[48] M-34864 to the Director, Fish and Wildlife Service (Feb. 18, 1947), *quoted in* Wheatley, *A Study of Administrative Procedures—The Department of the Interior*, 43 GEO. L.J. 166, 177 (1955).

[49] 116 F. Supp. 68 (D.D.C. 1953).

[50] *Id.* 75.

[51] *See generally* Delaney, *The Federal Administrative Procedure Act and the Post Office Department*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 200–03 (G. Warren ed. 1947) (citing *In re Debs*, 158 U.S. 564, 583 (1895)); Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845); Electric Bond and Share Co. v. S.E.C., 92 F.2d 580 (2d Cir. 1937); Boeing Air Transport v. Farley, 75 F.2d 765 (D.C. Cir. 1935); Union Pacific R. Co. v. United States, 219 F. 427 (8th Cir. 1915); United States v. Atlantic Coast Line R. Co., 215 F. 56 (4th Cir. 1914); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 MINN. L. REV. 402 (1920); Note, *Legislation, the Expanding Postal Power*, 38 COLUM. L. REV. 474, 478 (1938)). *See also* STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE AND PRACTICE IN THE FEDERAL AGENCIES 861–63 (Comm. Print 1957) [hereinafter cited as 1957 House STUDY].

> I have noted the judicial decisions cited in your letter and which emphasize the proprietary interest of the Federal Government in the postal system. It is well known that the United States owns the post office properties and facilities, and that the postal deficits are met by appropriated funds. I concur in your opinion that rules issued by the Postmaster General to prescribe the rates, zones, weight limits, and similar conditions upon which mail service is rendered to the public, involve only matters relating to public property, and are accordingly exempt from the provisions of Section 4 of the Administrative Procedure Act.[52]

Further clarification of the extent of the meaning of "public property" can be gleaned from the *Attorney General's Manual.* The *Manual* states, by way of example, that under the exemption for "public property" rulemaking that relates to

> the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of section 4. The exemption extends, for example, to rules issued by the Tennessee Valley Authority in relation to the management of its properties, and by the Maritime Commission with respect to ships owned by the United States.[53]

Some other examples of rulemaking deemed exempt from section 553 by the "public property" provision include rulemaking undertaken by the General Services Administration relating to the management and use of public buildings, surplus federal property, and stockpiled materials; rulemaking undertaken by the Department of Agriculture relating to the use and disposition of farm surplus commodities and the national forest system lands; rulemaking undertaken by the Department of the Interior relating to the use of the National Parks; and rulemaking undertaken by the Department of Transportation relating to the use and occupancy of the national capital airports.

The subject matter removed from usual rulemaking requirements by this provision is staggering in size both absolutely and in relation to our national resources. Consider the following data with regard to the different types, quantities, and values of federal property, the making of rules in relation to which is excluded from usual requirements for advance notice and public participation. On June 30, 1966, the federal government owned a total of $347 billion in real and personal property which was controlled by various agencies. Of this amount, $102.6 billion represents the estimated value of real property in the possession of the United States.[54] Federal land holdings amounted to a total of 764,762,000 acres representing 33.7% of the total land area of the country. They constituted as high a percentage of total area as 97%, 86%, 67%, and 64% in Alaska, Nevada, Utah, and Idaho respectively.[55] In addition, the federal government owned some 423,634 buildings containing a total of about 2.5 billion square feet of space.[56] The remaining portion of federal property consisted of personalty holdings of all kinds including machinery and equipment, commodities, materials and supplies, and accounts and loans receivable, which were valued at $244.4 billion. Of this, $3.4 billion represented the value of commodities for sale by the national government.[57]

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[52] Delany, *supra* note 51, at 202.

[53] ATTORNEY GENERAL'S MANUAL 27.

The "public property" of the United States can be roughly classified on a functional use basis. The following table shows the primary breakdown on this basis as of June 30, 1966.[58]

TABLE A

Functional Use of "Public Property" as of June 30, 1966

National Defense Purposes	$208.5 billion
International Affairs & Finance	26.4 billion
General Government Purposes	22.6 billion
Agriculture & Agricultural Resources	12.8 billion
Commerce and Transportation	11.2 billion
Education	5.7 billion
Housing & Community Development	4.6 billion
Space Research & Technology	3.8 billion
Veterans' Benefits & Services	3.4 billion
Health, Labor & Welfare	798.0 million

As the above table clearly indicates, the impact on the daily lives of millions of Americans from regulations governing the management, use, and disposition of these vast governmental assets is enormous.

C. Loans

The exemption for rulemaking involving matters relating to "loans" covers a very wide spectrum of government policy-making. The term "loan" covers "something lent for the borrower's temporary use on condition that it or its equivalent be returned."[59] "Loan" covers an "advance of money with an absolute promise to repay," a "[b]ailment without reward, consisting of the delivery of an article by the owner to another person . . . and returned either *in specie* or in kind," and may either be with or without interest or other similar charge payable to the lender by the borrower.[60]

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[54] STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 89TH CONG., 2D SESS., FEDERAL REAL AND PERSONAL PROPERTY INVENTORY REPORT (CIVILIAN AND MILITARY) OF THE UNITED STATES GOVERNMENT COVERING ITS PROPERTIES LOCATED IN THE UNITED STATES AS OF JUNE 30, 1966. at 11 (Comm. Print 1966) [hereinafter cited as PROPERTY INVENTORY REPORT].

[55] 1968 STATISTICAL ABSTRACT OF THE UNITED STATES 194 [hereinafter cited as STATISTICAL ABSTRACT].

[56] PROPERTY INVENTORY REPORT 247.

[57] *Id.* 11.

[58] *Id.* 12–13.

Two examples of how the "loans" exception would operate in practice will illustrate its breadth. It seems obvious that this exception would make the rulemaking requirements of section 553 inapplicable to the usual functions of government lending agencies,[61] including their programs which seek to guarantee loans, "since they are matters relating to public loans."[62] Not surprising then is the holding in *Barrington Manor Apartments Corp.* v. *United States.*[63] Plaintiff alleged that a Federal Housing Administration regulation, providing that a one per cent prepayment penalty would be levied on all mortgages held by that agency in cases where they were paid before due, was invalid since it was not adopted in accordance with the rulemaking requirements of section 553. The court rejected this argument because the lending functions conferred on the FHA by the statute under which the regulation was promulgated were excluded from those requirements by the operation of section 533 (a) (2).[64]

Although the above example was a fairly clear case, another illustration demonstrates the extent to which a regulation need only "relate to" loans made by the government to be considered within the subsection (a) (2) exemption. *Stroud v. Benson*[65] involved the question whether an order of the Secretary of Agriculture requiring identification of varieties of tobacco on the auction warehouse floor was a rule subject to the procedures of section 553. The Secretary issued an order requiring such identification without prior notice or public participation, on the grounds that it was "a matter relating to" the loan and price support program for tobacco. The court affirmed the Secretary's judgment and justified the relationship because

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[59] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1326 (1966).

[60] BLACK'S LAW DICTIONARY 1085 (rev. 4th ed. 1968).

[61] Reich, *Rulemaking Under the Administrative Procedure Act*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 498 (G. Warren ed. 1947).

[62] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 27.

[63] 392 F.2d 224 (Ct. Cl. 1968).

[64] *Id.* 227. The court cited Grymes Hill Manor Estates v. United States, 373 F.2d 920, 923 (Ct. Cl. 1967) for the same proposition. That case also held that the function of the F.H.A. pursuant to the statute under which the regulation was promulgated was exempted from the § 553 requirements by subsection (a) (2). The opinion is not explicit as to which of the (a) (2) exemptions was involved, but it may be implied that the court was referring to the term "loans."

[65] 155 F. Supp. 482 (E.D.N.C. 1957).

> it has been found as a fact that failure to identify the discount varieties on the warehouse floor has and will tend to depress the tobacco market. A depression of the open market price below the level of the support price would ultimately result in the increase of government loans and consequently government loan stocks. The instant order is directly related to this contingency.[66]

This case illustrates the very broad possibilities of an exemption couched in terms of "a matter *relating to* . . . public . . . loans."

The very great variety and quantity of important government rulemaking activities exempted by the "loans" language from the requirements of section 553 can best be appreciated by enumerating some of those programs to which it applies. The *Attorney General's Manual* states that this exemption applies to "rules issued with respect to loans by such agencies as the Reconstruction Finance Corporation, the Commodity Credit Corporation, and the Farm Credit Administration. It also exempts rules relating to guarantees of loans, such as are made by the Federal Housing Authority and the Veteran's Administration, since they are matters relating to public loans." [67] Other specific rulemaking deemed exempt from the usual notice and public participation requirements of section 553 because it relates to "loans" includes rulemaking by: (1) the Department of Transportation involving loans to assist financing, acquisition of, or capital improvements to, urban mass transportation systems; (2) the Small Business Administration involving loans to state and local development companies, economic opportunity loans, business loans, and disaster loans; (3) the Department of Health, Education and Welfare involving loans under the National Defense Education Act; (4) the Department of Agriculture relating to loans in the price support programs, loans for rural electric and telephone systems, loans for farm operating needs, farm ownership loans, and soil and water conservation loans; and (5) the Department of Housing and Urban Development relating to loans to finance low and moderate income housing, loans to assist rehabilitation of housing in urban renewal areas, and loans for rental housing for senior citizens. Of course, while the above listing includes some of the more important areas, it is in no way exhaustive for any one agency or all agencies.

To get an idea in economic terms of the size, diversity, and importance of the national government's loan operations, and the extent to which they are a significant factor in our economy and lives, consider the following data. In 1968, $57.2 billion in direct federal loans and $108.1 billion in guaranteed federal loans were outstanding.[68] The same year, $25.2 billion in new direct federal loans and $21.9 billion in new guaranteed federal loans were made.[69] In 1968, the Bureau of the Budget projected that the amount of outstanding guaranteed and insured loans would increase by some $12.7 billion in 1969 and by a record $20.6 billion in 1970.[70] By the end of 1970, $190.6 billion in loans directly made or guaranteed by the United States will be outstanding.[71] Excluding foreign loans, direct loans made by the United States in 1966 were broken down into the following functional categories and amounts: [72]

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[66] *Id.* 490.

[67] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 27.

TABLE B

Direct Loans by the United States in 1966

Category of Use	*Amount*
Agriculture	$7.9 billion
Education	3.1 billion
Homeowners	3.0 billion
Industry	978.2 million
States, territories, etc.	855.8 million
Financial institutions	1.9 million
Other loans	675.8 million

In important industries like housing and agriculture federal loans or guarantees of private loans account for an enormous part of the credit available for financing such activities.

The above data make it clear that direct federal loans and federal guarantees of private loans play a very large and vital role in our national government's efforts to (1) improve housing and encourage homeownership, (2) develop agriculture and other natural resources, (3) promote business, especially exports, transportation, and small business generally, (4) redevelop communities and regions, and (5) aid higher education.[73] Consequently, the section 553(a)(2) exemption relating to "loans" excludes from the usual requirements of notice and public participation rulemaking having a vital and enormous impact on the public at large, and specifically bearing on many of the most pressing domestic problems facing our nation.

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[68] U.S. BUREAU OF THE BUDGET, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES, FISCAL YEAR 1970, at 62 [hereinafter cited as SPECIAL ANALYSIS].

[69] *Id.* 57.

[70] *Id.* 63.

[71] *Id.* 61.

[72] PROPERTY INVENTORY REPORT 19.

[73] SPECIAL ANALYSIS 54.

D. *Grants*

The exemption for rulemaking related to "grants" principally refers to a situation in which the government gives something to a recipient, such as money or land, to enable him to do a particular thing. The main thrust of the "grants" exclusion is toward cases where the United States makes a gift of property on the condition that the recipient use it or its proceeds to achieve a specific object. As used in section 553(a)(2), "grants" covers all "subsidy programs" and "grants-in-aid programs under which the Federal Government makes payments to state and local governments" and private individuals and entities.[74] The subject or object of the grant and its terms and conditions are irrelevant.

The number of such grant programs is very large and their objects numerous, as the following diverse examples will illustrate. The Department of Labor administers grants seeking to secure vocational rehabilitation for migrant workers, and grants for the administration of unemployment insurance and employment service programs. The operation and construction of ships and dissemination of technological information throughout American business are the subjects of grants by the Department of Commerce. Much highway construction results from grants made by the Department of Transportation. The Department of Agriculture supports through grants such diverse programs as those involving school meals, agricultural conservation, and community water and sewer systems. The Department of Health, Education and Welfare makes various kinds of grants to aid the construction and equipment of elementary, secondary, and other educational institutions, as well as to support health related research, the construction of health related facilities, child welfare services, vocational rehabilitation services, and special services for care of the aged and mentally retarded. Among their many grant programs, the Department of Housing and Urban Development makes grants for urban renewal, the Office of Economic Opportunity grants to support legal services for the poor, and the Department of Interior grants to control water pollution.

The enormous significance of the exemption for rulemaking relating to "grants" from the usual requirements of section 553 can be further appreciated by an examination of the extent of our national government's grant programs. Grants-in-aid to state and local governments comprise the overwhelming bulk of federal grants. In 1970 it is estimated that such grants to state and local governments will reach $24.7 billion, accounting for 99% of total federal aid received by those entities in that year. Grants will then account for almost 18% of state and local revenues,[75] and an estimated 24% of federal expenditures on civilian domestic programs.[76]

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[74] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 27–28.

Functionally speaking, federal grants to state and local governments will break down in the following way during the next fiscal year: agriculture and agricultural resources 4%; natural resources 3%; commerce and transportation 22%; community development and housing 11%; education and manpower 18%; health and welfare 40%; and other 2%. "The cumulative effect of the tremendous increases in human investment grants in the 1960–70 period will be to place the principal emphasis of federal aid . . . on health and welfare activities—as well as give added impetus to education and manpower, and community development and housing efforts. In 1970, these programs will account for 69% of total estimated aid payments." The rising tide of federal grants activities in the areas of human investment can best be depicted by noting that between 1964 and 1970 annual federal grants for health and welfare purposes will rise some $6.3 billion or 168%; for education and manpower purposes by $3.5 billion or 364%; and for community development and housing purposes by $2.3 billion or 546%.[77] On the basis of these facts it is clear that rulemaking relating to "grants" by the national government has an enormous and vital effect on the daily lives of tens of millions of Americans.

E. *Benefits*

As used in section 553(a)(2) the term "benefits" mainly refers to programs under which the national government makes payments in money or kind to persons in consideration of previous contributions paid to, or in some cases services rendered to, the United States. In a few situations the payments are made merely because of the individual's status. Cash benefits are usually paid from government trust funds, and, unlike grant money, may normally be expended in any way and for any purpose the recipient desires.

The "benefits" exclusion has a very broad scope and has been deemed to cover rulemaking relating to a great variety of programs. More specifically, this exemption applies to rulemaking relating to pensions, medical care, and other similar services provided to veterans by the Veterans' Administration, and to all rulemaking relating to old age, survivors, disability, and health insurance payments made under the Social Security Act.[78] The exclusion also covers rulemaking relating to the social insurance programs administered for employees of railroads by the Railroad Retirement Board, the social insurance programs for federal employees administered by the Civil Service Commission, and the federal-state unemployment insurance program whose monies are administered by the Department of Labor. Federal rulemaking relating to federally financed, state administered, federal-state assistance programs, such as Aid to Families with Dependent Children, may also be considered by this exemption as well as that for "grants."

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[75] SPECIAL ANALYSIS 203.

[76] *Id.* 208.

[77] *Id.* 207.

Federal outlays for cash benefit programs totaled $40 billion in 1968, an amount equivalent to about five per cent of the Gross National Product. Cash benefits program expenditures are expected to reach about $49 billion in 1970. The total amount spent on cash benefit programs have comprised about one-fourth of all federal expenditures for all purposes in each year since 1961.[79] Cash benefit programs may be categorized roughly into two groups—one consisting of income replacement benefit programs, and another of income support programs. Some $42.5 billion in federal outlays will be made in 1970 for income replacement benefit programs providing protection against loss of earnings due to retirement, disability, death of the breadwinner, and unemployment. Of this amount, about $36.5 billion will be from accounts funded in part by employer and/or employee contributions to which over fifty million Americans contribute. In 1969, benefits from the above income replacement programs will be paid to approximately 18 million people.[80] Federal benefit outlays in the income support programs which base benefits on current needs will amount to $5.9 billion by 1970, and will reach almost 12.4 million recipients.[81] Aid to Families with Dependent Children is one of the best known of these programs.

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[78] *See* ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 28.

[79] SPECIAL ANALYSIS 174–75. Some of this money, and some of the money in the following figures with regard to "benefits," represents grant payments to the states for benefits programs they will administer. Consequently those funds might better be viewed as "grants" rather than "benefits," even though they may result in the payment of federally financed benefits. However, the overwhelming bulk of the money referred to in the accompanying figures are benefit payments made directly by the United States. *See id.* 187 (HEW "Public Assistance" category).

[80] *Id.* 175, 179–80; STATISTICAL ABSTRACT 476. The survivors and disability programs in this category will benefit some 7.8 million beneficiaries and 4.9 million beneficiaries respectively; and unemployment payments will aid about 5.3 million individuals.

[81] SPECIAL ANALYSIS 182.

The cash benefit programs are administered by a small group of governmental units as the following table will show:[82]

TABLE C

Governmental Units Administering the Cash Benefit Programs

Governmental Unit	*Amount*
Department of Health, Education & Welfare	$33.3 billion
Veterans' Administration	5.5 billion
Department of Labor	2.9 billion
Department of Defense	2.7 billion
Civil Service Commission	2.4 billion
Railroad Retirement Board	1.6 billion

In addition to all of the above federal benefit programs providing cash benefits which the recipient is free to use as he chooses, outlays in federal programs providing benefits in kind will be in excess of $5 billion by 1970,[83] and will provide benefits for many millions of persons.[84] It is rulemaking related to these programs, involving billions of dollars and directly affecting tens of millions of Americans, that is removed from the mandatory notice and public participation requirement of section 553 by the term "benefits" in subsection (a)(2).

F. *Contracts*

The last section 533(a)(2) exemption to be considered is that for "public . . . contracts." The main thrust of the "contracts" exemption seems to be toward government procurement of real or personal property and services. The legislative history of the Act does cast some doubt as to whether "rulemaking relating to public . . . contracts" includes one area, vitally important to a great many people—that of "minimum wage determinations of the Department of Labor in connection with public contracts." [85] However, in light of all the evidence and the unqualified sweeping language of the exemption those determinations must be deemed within that exclusion.[86] In this connection it should be noted that the *Attorney General's Manual* unequivocally states that "the exemption extends to wage determinations made by the Labor Department under the Davis Bacon Act and the Walsh Healy Act, as conditions to construction and procurement contracts entered into by the Federal Government." [87]

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[82] *Id.* 187.

[83] *Id.* 186.

[84] *Id.* 185.

[85] Objections were made to an early draft version of the APA which exempted "any matter relating to . . . public property or contracts" on the grounds that the § 4 rulemaking procedures "should not be applied to minimum wage determinations of the Department of Labor in connection with public contracts." The reaction to the criticism was to suggest that the exemption now found in § 553(b)(B) for situations in which the usual procedures are "impracticable, unnecessary, or contrary to the public interest," "amply provide[s] for proper exemptions," rather than to state what otherwise would seem obvious: the term "contracts" completely and unqualifiedly exempted Department of Labor wage determinations from § 4. S. Doc. No. 248, *supra* note 2, at 18.

The "contracts" exemption clearly has a very wide scope. In addition to General Services Administration rulemaking relating to contracts for the procurement of land, goods, and services, and to construction contracts of all kinds, the exemption applies, as do all of the other (a)(2) exemptions, to rulemaking of that sort by every federal agency. For instance, it extends to rulemaking by the Treasury Department relating to the terms under which government securities are issued, owned and redeemed "since securities are government contracts." [88] It also extends to regulation making for Department of Agriculture programs such as the Cropland Adjustment Program, Feed Grain Program, Cropland Conversion Program, Soil Bank Program, Wheat Diversion Program, Crop Insurance Program, and a number of Commodity Credit Corporation programs. In addition, it applies to such Health, Education and Welfare contracts as those to establish or expand law school clinical experience programs, and those for university research on a huge number of topics. It also, of course, applies to rulemaking relating to the nondiscrimination in government contracts program administered by the Department of Labor.

An idea of the significance and importance of such government contracts, rulemaking relating to which is excluded by section 553(a)(2) from the usual rulemaking requirements, may be gained from the following illustrative data. The jobs of millions of Americans are directly and indirectly affected by the contracting activities of the federal government. In fiscal 1969 the United States will purchase $20.6 billion in nondefense related goods and services.[89] Outlays under contracts for direct, nondefense related federal public works, which include the design and construction of new structures, major improvements and modifications of existing structures, and in some cases site acquisition, will reach about $2.5 billion in 1970.[90] The total estimated cost at that time for all nonmilitary federal public works in progress, which includes the sum of payments to be made under contracts in process and contracts to be newly initiated, will amount to $12.5 billion.[91]

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[86] *See* ATTORNEY GENERAL'S MANUAL 28, quoted in text accompanying note 87 *infra;* Reich, *supra* note 61, at 498. Note also that the continuous practice of the Department has been to treat such determinations as exempt. 1969 Survey, *supra* note 27 (response of the Department of Labor).

[87] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 28 (citations omitted) (citing Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)).

[88] 1969 Survey, *supra* note 27 (response of the Department of the Treasury).

[89] U.S. BUREAU OF THE BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1969, at 541.

In 1967, awards were made under defense related procurement contracts, including contracts to obtain military supplies, services, or construction of all sorts, amounting to $44.6 billion.[92] For that same year, it was estimated that jobs for 7.4 million workers, comprising about ten per cent of all employees in this country, was generated by Department of Defense contracts.[93] It should also be noted that arrangements for the financing of the public debt of the United States, which the Treasury treats under the "contracts" exemption, covered $326 billion in 1967. This included $210 billion in marketable public issues.[94] Rulemaking relating to all of the above, affecting the lives of millions of individuals in every part of this country, is removed by the "contracts" exemption from the requirements of subsections (b)–(e).

G. *Some Conclusions With Respect to the Scope and Practical Importance of Section 553(a)(2) Exemptions*

Even if they are strictly construed, which they seldom seem to be in practice, the section 553(a)(2) exemptions are extraordinarily broad and of very great significance. The language of these exemptions excludes an enormous quantity of rulemaking from the requirements of section 553. The classes of rulemaking excluded by it are also of especially great qualitative importance to certain segments of our society and to the public interest at large.[95] The rulemaking involved has a great impact on our national effort to cure the pressing human problems of the last half of the twentieth century. Most rulemaking excluded from section 553 by subsection (a)(2) relates to programs, or functions, or techniques for governing, which have an unusually large impact on the daily lives of tens of millions of Americans. Efforts to solve our urban crisis, racial problems, poverty problems, environmental quality difficulties, and human spirit and character maladjustments have mainly been pursued through the use of "public property, loans, grants, benefits, or contracts."

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[90] SPECIAL ANALYSIS 221–22.

[91] *Id.* 226.

[92] STATISTICAL ABSTRACT 249.

[93] *Id.* 251.

[94] *Id.* 394–95.

[95] See Bonfield, *supra* note 31, at 512–20.

As a result, most rulemaking attempting to deal with the important domestic problems facing our nation in this era has been conducted without any guarantee that public participation of the kind stipulated by section 553(b)–(e) will be allowed. As previously noted, the rulemaking procedures actually utilized in the situations currently exempted by section 553(a)(2) are frequently much less effective to secure adequate public participation than those found in section 553(b)–(e). The impact of this situation on the poor, city people, the farmer, and other separable segments of our society is particularly detrimental.

The exemptions under consideration here are especially undesirable because they tend to insulate almost all of the rulemaking of certain specific federal agencies against unwanted public participation. Agencies whose rulemaking is almost entirely insulated against such mandatory public involvement may, as entire governmental entities, completely lose touch with the public they are to serve, and in that situation, the public may lose any day to day ability to influence the operations of such agencies. Although this does not always occur, it is nevertheless a grave danger.

Two points deserve reiteration. First, rulemaking of the kind exempted by subsection (a)(2) intimately affects millions of Americans in their daily lives, and is one of the most important and frequently used means by which our national government seeks to solve our pressing social, economic, and environmental problems. As the Senate Committee on Administrative Procedure stated when it recently recommended modification of section 553(a)(2),

> [t]he importance of the Government's activity in this area is now enormous, involving, as it does, tens of billions of dollars of expenditures yearly and vast properties. The rules regulating this activity are consequently of vital concern to the public and it is only reasonable that it be informed and allowed to take part when rules relating to public property, loans, grants, benefits, or contracts are made.[96]

Second, the exemption of rulemaking relating to "public property, loans, grants, benefits, or contracts" also creates a special danger that certain important government agencies may, as entities, become out of touch with and unresponsive to public needs. In light of these two points, and the many reasons favoring required opportunities for public participation in rulemaking that were discussed in the introduction to this paper, the reasons assigned to justify these particular exemptions must be examined with extraordinarily great care.

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[96] *S. 518 Hearings*, *supra* note 30, at 379.

V. JUSTIFICATIONS ADVANCED FOR THE "PUBLIC PROPERTY, LOANS, GRANTS, BENEFITS, OR CONTRACTS" EXEMPTIONS

Arguments advanced to justify the exemption of the so-called "proprietary" activities of government from usual rulemaking procedures range in character. Some are purely theoretical and historical. Others are intensely practical. But they all deserve careful enumeration and evaluation, for only then can it be ascertained whether they are adequate to justify the status quo in light of the competing policies which favor public participation in rulemaking.

The right-privilege distinction furnishes the most frequent justification for the exemption of subsection (a)(2) rulemaking from the procedural requirements of section 553. The theory is that no member of the public has a "right" to use public property, receive a loan, grant, or benefit from the government, or to make a contract with the government. Rather, these are all "privileges," and if a man does not like the terms on which these privileges are made available to him, he can simply refuse to accept the privileges and thereby avoid submission to their conditions. Consequently, rulemaking relating to these subjects should be treated differently than rulemaking relating to other government functions. This idea has been expressed in a number of ways.

An official objecting to the legislative imposition of certain procedures on his agency's activities, including rulemaking of the sort involved here, stated that "the parties affected [by the Bureau of Reclamation's activities] . . . voluntarily submit to regulations in order to gain certain privileges." [97] The Department of Commerce thought that following the usual procedures for rulemaking involving the "proprietary functions" appeared to be "unduly burdensome, particularly where the subject matter does not involve a right of the private parties concerned, but rather bestowal upon them of such benefits as loans, grants, etc." [98] Somewhat differently stated—so as to include the idea that a person may avoid complying with subsection (a)(2) rules promulgated in the isolation of government bureaucracy by not dealing with the government—is the version supplied by the General Services Administration a number of years ago:

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[97] *1941 Hearings, supra* note 17, at 689 (statement of Commissioner of Reclamation).

[98] *S. 1663 Hearings, supra* note 30, at 311.

> The rulemaking which is presently subject to section 4 of the Administrative Procedure Act is rulemaking of the true "regulatory" type; i.e., rulemaking that has a direct impact upon industries or the public which have no choice but to be regulated in the public interest. Such rulemaking affects all members of the public who engage in the regulated activity, whether they are dealing with the Government or with other members of the public, while GSA's regulations apply, in general, only to Government agencies and those members of the public who choose to deal with the Government by furnishing supplies or services, leasing space, buying surplus property, etc. Accordingly, since those affected may extricate themselves of their own volition from the impact of GSA regulations by not dealing with the Government, due process does not require such safeguards as are provided in section 4 of the redraft of S. 1663 [which eliminates the subsection (a) (2) exemptions] for their protection.[99]

The "right-privilege," "avoidable conditions" argument is concerned with the relationship between the subject matter of the exempted category and the recipient. Another distinction, this one between the proprietary and nonproprietary functions of the Government, deals more broadly with the nature of the governmental activity involved; yet it is often used in close conjunction with the "right-privilege" argument to justify the current subsection (a) (2) exemptions. It is argued that the procedures contained in section 553 should not be applied to rulemaking involving the subjects listed in subsection (a) (2) because when government exercises these functions it is acting in a "proprietary" capacity.[100] Consequently, in that situation the Government should be treated as if it were a business or private person handling private money or affairs. The floor manager of the APA in the House argued strongly for this interpretation during the debate on that bill.[101] Public participation in rulemaking relating to these kinds of situations is deemed to be unnecessary since if a businessman were carrying on the same activities, a private person would have no right to participate in his decision-making process.[102] Furthermore, it has been asserted that "freeing functions of a proprietary nature, in order to improve the position of the Government when it is operating in an area and along lines similar to a business enterprise, reflects the intentional and traditional position of the Congress in this connection." [103]

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[99] *Id.* 522. *See id.* at 427.

[100] *Id.* 494 (Department of Defense).

[101] S. Doc. No. 248, *supra* note 2, at 358.

[102] The Department of Defense has stated that "to publish or to admit the public to the formulation of such a policy [regarding pricing and negotiation of contracts] could only put the Government at serious disadvantage in the negotiation of the contracts for which the policy was intended. Certainly there is no comparable disclosure required of private parties to Government contracts, and it would be unthinkable for the Government, in its proprietary capacity, to participate in the formulation of the business policies and practices of the firms with which it deals." 1957 HOUSE STUDY, *supra* note 51, at 278. *See also S. 518 Hearings, supra* note 30, at 279 (REA).

The above arguments should not be sufficient to justify the current section 553(a)(2) exemptions. In the first place, the law is currently in the process of reevaluating the "right-privilege," "avoidable conditions" distinction as a ground upon which to base legal judgments regarding the propriety of governmental action.[104] The notion that a government agency should be free to deal with people in any manner the former pleases when "privileges" are involved—an idea which was never the product of common sense or sound social policy—is fast disappearing both in the law, and in the public mind. Secondly, because many people have come to depend upon such "privileges" as welfare benefits of various kinds, social security and veterans' benefits, government guaranteed home loans, federal contracts, and public recreation facilities, most people now consider them a part of their entitlement. Furthermore, these people have increasingly little choice but to accept such benefits, whether they be called "rights" or "privileges." Realistically, the conditions imposed on recipients of such grants, benefits or public contracts, for example, frequently cannot be avoided; in the world as it actually is, most people are in no position to refuse the "privilege" to which the strings are attached.

Finally and most important, both the "right-privilege" and the "proprietary-nonproprietary" distinctions are meaningless in this context because they are not tools with which the problem at hand can be realistically analyzed and evaluated. Rather, they are screens which enable the user to avoid the hard work of investigating the real problem involved. To say that public participation is not required in rulemaking relating to "public property, loans, grants, benefits, or contracts" because they involve "privileges" or "proprietary" matters is to declare a result without giving any relevant reason for it. The fact that a certain construction firm has no "right" to contract with the Government, or that when the Government enters into such a contract it is acting in a "proprietary" capacity, or that the firm need not apply for such a "privilege" if it does not like the rules governing those contracts, has little to do with answering the question under examination. Those labels do not help a decision-maker to decide intelligently whether application of section 553 procedures to rulemaking involving "public property, loans, grants, benefits, or contracts" is in fact undesirable. That conclusion can be reached only after a careful examination of the consequences flowing from an application of section 553 procedures to such cases; and it can be justified only if the specific advantages of public participation in those cases are outweighed by the specific disadvantages that would flow from such a requirement.

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[103] 1957 HOUSE STUDY, *supra* note 51, at 1732 (Federal Housing Administration).

[104] *See, e.g.*, Reed v. Gardner, 261 F. Supp. 87 (C.D. Cal. 1966); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alystyne, *The Defense of the Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

As previously noted, the sound administration of government demands fully informed decision-makers. Presumably we intend all aspects of governmental activity to be administered wisely including those that can be labeled "proprietary" and those that involve the dispensing of "privileges." Similarly, our dedication to responsible democratic government requires that the rulemaking process be responsive to affected citizens by allowing them to communicate effectively their views to the relevant officials. Here, too, we presumably want citizens to have a chance to protect their interests against administrative action prejudicial to them in any way, whether that prejudice stems from government action involving a "right" or a "privilege," or a "proprietary" or "nonproprietary" matter. If the (a)(2) exemptions are to persist in the face of such important competing public policies, it should be because of some particular undesirable consequences that might flow from their elimination and not because an irrelevant label can be attached to the subjects they embrace.

Most federal agencies making rules relating to "public property, loans, grants, benefits, or contracts" take the position that the repeal of section 553(a)(2) would somehow harm the performance of their responsibilities. The specific practical justifications offered to support the exemptions in question vary. They have been gathered from various sources, including congressional hearings, a survey prepared for this study,[105] and a related survey done for the Administrative Conference of the United States in 1968.[106]

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[105] The question asked in this survey was:

> From the point of view of your department or agency what disadvantages, if any, do you see in a statute which would eliminate the general exclusions now found in subsections 553(a)(1)–(2) and thereby make the provisions of subsections 553(b)–(e) applicable to all rulemaking relating to those currently excepted situations? Be as specific as possible, furnishing concrete, detailed examples. Overly general answers will not be particularly helpful. If your answer varies from program to program or from one type of currently excepted rulemaking to another, please specify and explain in detail.

Despite the instructions contained in the last three sentences, most agencies responded with general answers and did not furnish concrete, detailed examples of how the alleged disadvantages arise in practice. The failure to present specific instances may be indicative of the frailty of the many arguments made against modification of § 553(a)(2).

The most frequently articulated, practical justification for the subsection (a)(2) exemptions is that their elimination would cause a greatly increased work load resulting in both delay in the performance of the Government's everyday functions and increased costs in carrying on those functions. The spectre of inefficient delays arises from a sense that the bulkiness of the rulemaking task could cause the bureaucracy to bog down if the exemptions were eliminated. The General Services Administration has opined, for example, that "[p]ublic participation [through rulemaking] in the management [of] property and contracts would be so complicated and cumbersome as to seriously impede and delay the efficient and economical conduct of the Government business." [107] Similarly, "delay in rendering services and administering benefits" was the prediction of the Veterans' Administration if subsection (a)(2) was eliminated.[108] The Department of Interior has asked, in this regard:

> Is the public really better served through the medium of notice of rulemaking and publication in the Federal Register in every instance of the formulation of a statement of policy? What effect would such a requirement have on the operations of a program agency? Do we want to take the chance of subjecting much of the informal policy making that we do today on a daily basis to the potential of interminable delays? Can our programs afford these delays? Even more importantly, will Congress and the public tolerate these delays? We firmly believe that the answer to all of these questions, when carefully analyzed, must be "no"! [109]

On the issue of increased operating costs, the Farmers Home Administration has reported, for example, that elimination of these exceptions "would cause a tremendous increase in the volume of work and operating costs" of that agency.[110] Even an agency seemingly unopposed to the modification of this exemption has noted that such a change "would, of course, substantially increase the cost of government." [111]

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[106] The question asked in 1968 was:

> What disadvantages, if any, do you see in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) *as they may apply to . . .* [your programs with a substantial impact on the poor], and thereby would make the provisions of 5 U.S.C., 553(b)–553(e) applicable to all rulemaking relating to those programs? (Assume that the several exceptions now in sections 553(b) through (e) would remain unchanged.)

Bonfield, *supra* note 31, at 548.

[107] 1957 House Study, *supra* note 51, at 1579.

[108] 1969 Survey, *supra* note 27. *See also* similar comments by the same agency in 1957 House Study, *supra* note 51, at 2060 and *S. 1663 Hearings, supra* note 30, at 463.

[109] *S. 518 Hearings, supra* note 30, at 42.

[110] 1969 Survey, *supra* note 27 (response of FHA, Department of Agriculture). *See also id.* (responses of Forest Service and Soil Conservation Service, Department of Agriculture; Atomic Energy Commission (attachment to response); Veterans' Administration); *S. 1663 Hearings, supra* note 30, at 144, 427 (Department of Agriculture and General Services Administration).

Elimination of the present exemptions is also deemed undesirable because it would cause adherence to the procedures of section 553(b)–(e) in many cases where the public has little interest in the rulemaking,[112] or is unlikely to make a significant contribution to it.[113] It is alleged that frequently a rule being considered in relation to one of the exempted subjects "is so limited in its application or so minimal in its public impact that . . . any solicitation of comment from the public would be completely unjustified." [114]

Furthermore, if rulemaking relating to "public property, loans, grants, benefits, or contracts" is subjected to the requirements of section 553(b)–(e), it is feared that the agencies involved in such rulemaking, and those members of the public most directly affected, would be placed in an adversary position, thereby discouraging mutual cooperation toward finding the best solution to common problems. The Tennessee Valley Authority has stated, for example, that their operations would be likely to be disrupted by such a polarization.[115]

The agencies also feared that repeal of subsection (a)(2) would remove desirable flexibility in such rulemaking. The Atomic Energy Commission complained in this regard, as an illustration, that if that agency's rulemaking relating to contracts had to comply with section 553, it would "lessen the Commission's flexibility in dealing with the many different kinds of contracting situations which arise." [116] A similar argument is that elimination of these exemptions would discourage agencies from making worthwhile changes in rules because of the more formal and particularized procedures that would be required. The House and Senate Reports on the APA noted that "[t]he exception of proprietary matters [in section 4] is included because the principal considerations in most such cases relate to mechanics and interpretations of policy, and it is deemed wise to encourage and facilitate the issuance of rules [on these excluded subjects] by dispensing with all mandatory procedural requirements." [117]

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[111] Bonfield, *supra* note 31, at 549 & n.47 (Department of Labor).

[112] *See* 1957 HOUSE STUDY, *supra* note 51, at 551 (Department of Interior, Fish and Wildlife Service).

[113] *See S. 1663 Hearings, supra* note 30, at 177 G (Department of Treasury) ; 1969 Survey, *supra* note 27 (response of Small Business Administration).

[114] *S. 1663 Hearings, supra* note 30, at 427 (General Services Administration). On another occasion a representative of the G.S.A. stated that "public advance notice in the Federal Register and public participation in the formulation of these rules is too much, costs too much, takes too much time, for many rules that would not warrant that type of effort." Transcript of the ABA Symposium on S. 1336, Washington, D.C. (Dec. 1, 1966) 109.

[115] TVA said that procedures similar to those in what is now § 553 "would place TVA and its distributors in an adversary position where the tendency would be for each distributor to try to gain an advantage in the formulation of the policy rather than working with TVA and other distributors in a mutual effort to find the best possible solution to each problem as it arises." *S. 1663 Hearings, supra* note 30, at 544. The agency gave a similar response in 1968. *See* Bonfield, *supra* note 31, at 549 n.49. *See also* 1957 HOUSE STUDY, *supra* note 51, at 374 (Office of Education, Department of Health, Education and Welfare).

[116] *S. 518 Hearings, supra* note 30, at 119. *See also S. 1663 Hearings, supra* note 30, at 544, stating that "a large measure of the success of T.V.A. . . . attained during the past 31 years has been due to its ability to maintain flexibility in its operations. The proposed revision [elimination of § 553(a)(2)] would take away this flexibility." ; 1957 HOUSE STUDY, *supra* note 51, at 2060 (Veterans' Administration) ; Bonfield, *supra* note 31, at 548 n.45.

Section 553(a)(2) is also said to be justified on the grounds that without it, there would be uncertainty in some cases whether public rulemaking procedures must be followed, thus causing litigation or encouraging the use of those procedures in situations where they would be unwise. The Department of Defense reported, for example, that the primary disadvantage to that agency of eliminating the broad exclusions in section 553 was "*uncertainty*," because the extent to which their rulemaking fits under the more limited exemptions found within section 553(b)–(e) was unclear. This "leads the Department of Defense to fear a rash of litigation testing . . . [its] interpretation of these . . . [other exemptions]." [118]

The current exemptions are alleged to be necessary for another reason. In some cases, section 553 procedures are said to be an insufficient means by which to assure that the relevant people participate adequately in rulemaking relating to the exempted subjects. Requiring adherence to those procedures in the subsection (a)(2) situations might, therefore, sometimes force an agency to follow two sets of procedures in order to involve properly the right people. The Office of Economic Opportunity has noted, for instance, that the procedures prescribed in section 553 "would generally prove ineffective in reaching the poor," and that they would have to be supplemented by other, more effective procedures currently being used by OEO.[119]

The difficulty with all of the previous general justifications for the current section 553(a)(2) exclusions is that they do not distinguish rulemaking relating to these exempted categories as a class from rulemaking already subjected to the requirements of section 553(b)–(e). Every one of the arguments just outlined could also be made with respect to those classes of rulemaking already subjected to the usual rulemaking procedures. The complaint that increased cost, work load, general delay, duplication, and the like will result if the currently excepted rulemaking is required to follow section 553(b)–(e) could, for example, also be made with respect to the run-of-the-mill regulatory rulemaking which we have already decided should be subjected to those provisions. The argument that required adherence to usual rulemaking procedures in these cases will reduce needed flexibility, cause uncertainty and litigation, be a waste in many cases, and discourage needed changes in rules, could also undoubtedly be used to support the exemption of all the currently included rulemaking. If it was worth risking some of these possible consequences to bring that rulemaking within the procedures contained in the statute, it is also worth risking them to bring the rulemaking under discussion here within those requirements. There is no evidence to support the general assertion that the deleterious consequences flowing from the inclusion of subsection (a)(2) rulemaking within the provisions of section 553 are greater than the similar consequences resulting from the application of that provision to the rulemaking already subject to its terms. Furthermore, experience with the section 553 procedures as applied to other kinds of rulemaking also suggests that these consequences are not likely to be as frequent, great, or detrimental in the mass of subsection (a)(2) situations as advocates of this exemption claim.

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[117] S. Doc. No. 248, *supra* note 2, at 199, 247.

[118] 1969 Survey, *supra* note 27 (response of Department of Defense). *See also id.* (response of REA, Department of Agriculture).

[119] Bonfield, *supra* note 31, at 549 n.48. *See also* 1969 Survey, *supra* note 27 (response of the Office of Economic Opportunity); *S. 1663 Hearings*, *supra* note 30, at 325 (Department of Health, Education and Welfare).

However, agencies do encounter specific situations involving subsection (a)(2) rulemaking in which a requirement that they provide advance notice and an opportunity to participate would be unreasonable. For instance, although the Department of Labor does not argue that there are any disadvantages in the elimination of section 553(a)(2) as it applies to rulemaking of general application, it takes a different view with respect to certain rulemaking situations of particular application.

> [T]he Davis-Bacon Act and some 45 related acts for Federal and Federally-assisted construction contracts . . . provide that the specifications for all such contracts shall require the contractor to pay to his laborers and mechanics at least the prevailing wage as determined by the Secretary of Labor. The determinations are made by the Secretary at the request of the contracting agency before the bids are let.
>
> . . . [The vast sums spent on Federal and Federally-assisted construction] are influenced not only by the level of the wages, but also by procedures which delay commencement of the contract. The aphorism that time means money is particularly pertinent here.
>
> . . . [A]t present the Department of Labor issues almost 26,000 prevailing wage determinations annually, averaging about 25 separate classifications of laborers and mechanics. Each classification may in-

> clude up to six separate findings as to cash wages and fringe benefits payments. The Department receives about 45,000 pieces of correspondence annually in connection with the issuance of these wage determinations [which constitute rulemaking within the definition of § 551 (4)].
>
> Application of the formal rule-making requirements of section 4 would require some 500 to 600 notices of proposed rulemaking to be published each week in the Federal Register. Interested persons would have an opportunity . . . [to participate in each case]. The processing of the submitted data, views, and arguments could result in obvious delays and additional personnel and other costs.[120]

On this basis the Department of Labor has concluded that "there are considerable disadvantages and no corresponding advantages in the elimination of the exemptions in section 553(a)(1)–(2) as they apply to wage determinations under the Davis-Bacon Act and its related acts and the Service Contract Act."[121] In this situation, it is clear that the unusually large costs which would be imposed on the Government by required adherence to normal rulemaking procedures far outweigh the benefits of public participation. These costs include not only the direct monetary cost of administering such procedures in this unusual situation but also the likelihood of substantial, deleterious consequences to the Government's construction program. Arguments based on the sheer magnitude of rulemaking necessary in a particular situation have also been made by a number of other agencies,[122] but few of them are as convincing or as extraordinary as that noted above.

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[120] *S. 518 Hearings, supra* note 30, at 239–40. *See also* 1969 Survey, *supra* note 27 (response of the Department of Labor.) The following additional reasons are offered for exempting wage determinations from § 553 rulemaking procedures:

> 1. Prospective bidders and interested labor organizations receive actual notice either by means of direct distribution by this Department, distribution by a parent organization, or examination of the advertisement for bids. The constructive notice which would be given by means of the Federal Register is not necessary.
>
> 2. Since the wage determination process is in essence a continuing one, interested persons have an open-ended opportunity to submit written data, views, or arguments about prevailing wage practices in a locality. An opportunity to submit such information in the case of any one determination therefore becomes almost meaningless.
>
> 3. The issued wage determination is, in effect, tentative until there is no longer a reasonable opportunity to notify bidders of substantive changes in its terms. Under these circumstances, a separate notice of rulemaking is meaningless.
>
> 4. There is no need for any delay in effective date of the wage determination. The purpose of a delay in effective date is to permit persons affected thereby to adjust to its terms. The bid submitted by a contractor repesents such an adjustment:

S. 518 Hearings, supra note 30, at 241.

[121] 1969 Survey, *supra* note 27.

[122] The 1969 survey response of the Department of Agriculture's Forest Service indicates that compliance with §§ 553(b)–(e) would require it to publish in the *Federal Register* "70 percent of the Forest Service Manual and Handbook, presently consisting of approximately 30,000 pages with changes averaging 5,800 annually." An attachment to the 1969 Survey response of the Atomic Energy Commission indicates that "at present, A.E.C. Procurement Regulations consist of approximately 860 pages and require modification about 40 times a year. Other A.E.C. manuals and handbooks relating to contracts and property consist of approximately 1,000 pages and are supplemented and revised about 50 times a year." *See also S. 518 Hearings, supra* note 30, at 70 (Department of Defense). It should be noted, however, that much of the above would be excluded from the usual rulemaking requirements of § 553 because they are "inter-

Similarly, there is no doubt that repeal of the (a)(2) exemptions must not interfere with the ability of agencies to react quickly in emergency situations, or in other situations where the proper performance of their functions requires rapid action. For example, there are many situations in which the Department of Agriculture cannot give advance notice of, or allow prior public participation in, its rulemaking relating to the wheat acreage allotment or crop insurance programs. The Department must frequently make changes in the regulations relating to those programs on an emergency basis, "because of a flood, other unusual weather, plant disease or something similar. In such cases [it needs] to change the regulation and make it effective at once without giving notice or delaying the effective date." [123] Similarly, agencies like the Department of Treasury and the Federal Reserve Board cannot perform their intended functions properly unless they can respond instantaneously, when necessary, to a changed economic situation by promulgating rules "related to the implementation of effective monetary or fiscal policy." [124] Rules imposing immediately needed safety requirements furnish another example.

There are also specific occasions involving subsection (a)(2) rulemaking in which advance public procedures of the type listed in section 553 may cause the very evil that the proposed rules are designed to avoid. This is so, for example, in the situations just referred to relating to the implementation of an effective monetary or fiscal policy. Advance notice in such cases may unsettle the money and credit markets, present opportunities for deleterious speculative activities, and "could have generally disruptive effects on financial markets and financial institutions." [125] Another case involving an exempted subject in which adherence to usual rulemaking procedures would have caused the very evil the contemplated rule sought to avoid occurred in 1960 when the Secretary of the Interior declared a moratorium on the acceptance of applications with respect to the public lands. The reason for the moratorium was that a very large backlog of such applications had accumulated while many new ones were continuously being filed. The Department pointed out that requiring

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pretative rules" or "general statements of policy" as opposed to "substantive rules" or "legislative rules." *See* 5 U.S.C. §§ 553(b)(A), (d)(2) (Supp. IV, 1969).

[123] 1969 Survey, *supra* note 27 (response of Production Stabilization Division, Department of Agriculture).

[124] *S. 518 Hearings*, *supra* note 30, at 51, 64–65, 395, 398, 400.

[125] *Id.* 395, 398, 400.

"publication in the Federal Register of a proposed moratorium would have invited a deluge of applications," making the situation much worse than it already was.[126]

In addition to the above, there is another class of situations involving subsection (a)(2) rulemaking in which adherence to the usual procedures involving advance notice and an opportunity to participate may be deemed unreasonable. A situation occasionally arises in which the rulemaking in question is so insignificant or minor in nature and impact that utilization of these procedures may be a complete and predictable waste. A rule requiring persons receiving federal loans or grants to sign the loan or grant instrument in ink or ball point rather than in pencil or crayon surely does not require public participation—nor, of course, do purely technical amendments to an existing rule. Similarly, if all of the information relating to the form and desirability of a given rule is necessarily within the exclusive possession of the national government because, for example, that information is a military secret or otherwise privileged from disclosure, advance notice and an opportunity to participate would be useless and a predictable waste.

The above discussion demonstrates that in certain types of cases involving rulemaking relating to "public property, loans, grants, benefits, or contracts," adherence to usual rulemaking procedures would be unreasonable. There are specific situations where the policies favoring public participation in rulemaking are outweighed by the conflicting need to operate the Government efficiently, expeditiously, effectively, and inexpensively. These situations, however, are a minority and break down into a number of well-defined classes which can be dealt with individually. They do not, therefore, constitute adequate justifications for the exemption of all rulemaking activity relating to the excepted subjects; rather, they only suggest that suitable, narrowly-drawn exceptions be provided for these atypical cases and situations.[127]

Finally, an interesting special argument has been made to justify the "contracts" exception. It has been argued that the "contracts" exemption should be retained in the current form because:

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[126] *Id.* 43.

[127] This was recognized, for example, in the 1969 Survey response of the Department of Agriculture's Production Stabilization Division. The response stated that the Division would be disadvantaged if § 553(a)(2) was eliminated because that action might make it difficult to deal with emergency situations. But the response went on to note: "It is true, of course, that notice and effective dates can be waived for cause, but an exemption, we feel, would be preferable to waivers."

> [I]t is more appropriate to make procedural improvements in this highly specialized field by amendments to title 41 [which deals in detail with public contracts]. The great advantage of the Administrative Procedure Act is that it can cut across a lot of statutes and give general rules for a lot of agencies where you could never catch up if you were dealing with every agency directly. But where you have one title that already sets forth very specialized procedures, if those are not proving adequate, then it seems to us that the way to correct them is to amend that title.[128]

This argument flies in the face of the intended function of the APA which is to achieve as much uniformity in federal administrative procedure as is reasonably possible through the use of a single comprehensive code on that subject.[129] If it is reasonably possible to obtain such uniformity with respect to the procedural requirements relating to most rulemaking, including that relating to contracts, an effort should be made to do so by amending the APA.

Moreover, the above special argument supporting the "contracts" exemption may be used merely to defer action which would modify the present procedures utilized in rulemaking relating to public contracts. In fact, it is probably not of great consequence whether rulemaking relating to contracts is subjected to the requirements of section 553(b)–(e) directly, or indirectly by adding those same provisions to title 41. But the implicit suggestion in the above special argument for a section 553 contracts exemption is that contracts rulemaking should not be subjected to the exact same kind of requirements as section 553(b)–(e) imposes. That is really why the subsection (a)(2) exemption for contracts should be retained, and any modifications of rulemaking procedure in such cases be worked, if at all, under title 41.

However, the evidence uncovered in this study does not support the need for a blanket and unqualified exemption from section 553 for all rulemaking relating to public contracts, or, for that matter, for all rulemaking relating to any of the other subjects listed in section 553(a)(2). As subsequent discussion will demonstrate, a more narrowly tailored exemption can be devised to deal with the exceptional cases of section 553(a)(2) rulemaking that need special treatment. Consequently, no persuasive reason appears to justify a continuation of the present unqualified and across-the-board exemption for rulemaking relating to "public property, loans, grants, benefits, or contracts."

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[128] *S. 518 Hearings*, *supra* note 30, at 334.

[129] *See* sources cited note 40 *supra*.

VI. Previous Proposals to Modify Section 553(a)(2)

In almost every session of Congress during this decade one or more bills have been introduced to reform federal administrative procedure. The most important bills attempting this were S. 2335, S. 1663, and S. 1663 (subcommittee revision) of the Eighty-eighth Congress, and S. 518, S. 2770, and S. 2771 of the Ninetieth Congress. All of these bills have one thing in common concerning the present exceptive language of section 553(a)(2); they eliminated the unqualified exclusion from section 553 for rulemaking relating to "public property, loans, grants, benefits, or contracts." In its place, they substituted varying kinds of specific and general exemptions to deal with the problems that might arise from that action.

Before outlining the ways in which these various proposals have sought to resolve the problem under consideration, an introductory caveat should be stated. In their general definitional section, every one of the above bills defined "rule" as "the whole or any part of any agency statement of general applicability and future effect designed to implement, interpret or prescribe law or policy. . . ." [130] The words "or particular" which appear after the word "general" in the current section 551 definition of "rule" were purposefully deleted. Rulemaking of "particular applicability" was treated by these statutes as adjudication and, as such, was governed by those provisions of the various acts.[131] This difference between the presently effective usage of the term "rule," and the more restricted version just described, makes comparisons between the present statute and these proposals somewhat awkward and misleading. That fact should be kept in mind during the following discussion.

The bill sponsored by the American Bar Association, designated as S. 2335,[132] inserted a qualified exemption in place of the presently unqualified one for rulemaking relating to subsection (a)(2) functions. It stated that "notice of or public participation in rulemaking" would not be required with respect to rulemaking "relating to public property, loans, grants, benefits, or contracts to the extent that the agency finds and publishes, with a statement of supporting reasons, that such public participation would occasion delay or expense disproportionate to the public interest." [133]

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[130] S. 2771. 90th Cong., 1st Sess. § 551(4) (1967); S. 2770, 90th Cong., 1st Sess. § 551(5) (1967); S. 518, 90th Cong., 1st Sess. § 2(c) (1967); S. 2335, 88th Cong., § 1001(c) (1964); Revised S. 1663, 88th Cong., 2d Sess. § 2(c) (1964); S. 1663 88th Cong., 1st Sess. § 2(c) (1963).

[131] *See, e.g.*, S. Rep. No. 1234, 89th Cong., 2d Sess. 8–9 (1966). This report accompanied S. 1336 which was virtually the same as S. 518, 90th Cong., 1st Sess. (1967).

[132] 88th Cong., 2d Sess. (1964). *See S. 1663 Hearings*, *supra* note 30, at 32.

[133] S. 2335, 88th Cong., 2d Sess. § 1003(f)(2) (1964).

Where an agency could not make such a finding, it could still utilize a generally applicable exemptive provision to adopt temporary rules relating to those subjects without giving any prior notice or chance for public participation. That provision applied "where an agency finds that (1) immediate adoption of the rule is imperatively necessary for the preservation of the public health, safety, or welfare, or (2) compliance with the requirements of this section would be contrary to the public interest." These findings, and a statement of the reasons for them, had to be published with the rule, which could not be valid for more than six months unless it was extended in compliance with the usual notice and opportunity to participate requirements of section 553.[134] And finally, in no case did the ABA bill remove the right of interested persons to petition for the issuance, amendment, or repeal of a rule, and the agencies' obligations in respect thereto.

S. 1663 [135] substituted for the present section 553(a)(2) exemptions a slightly different kind of qualified provision than that used by the ABA bill. In those cases where "notice and public participation would be unwarranted or contrary to the public interest," rulemaking relating to "public property, loans, grants, benefits, or contracts" was specifically excluded from every provision of section 553, including the right to petition.[136] There was no requirement that the agency publish such a finding or the reasons for it with the rule so issued. Rulemaking relating to the subjects under consideration here could also be excluded from the notice and opportunity to participate provisions of section 553 under a generally applicable emergency exclusionary provision if the public interest demanded it. The bill stated that in any case where an agency finds, and publishes the finding and the reasons for it with the rule issued, "that adoption of the rule without notice is necessary in the public interest," it may do so. However, in such situations the emergency rule could not be effective for more than six months, and could be renewed only by commencement of a rulemaking proceeding following usual procedures.[137]

The Senate Subcommittee on Administrative Practice and Procedure brought out a revised version of S. 1663 [138] which completely abandoned the specific qualified exemption for "public property, loans, grants, benefits, or contracts" found in the original version of the bill. Revised S. 1663 contained no exception of any kind for rulemaking relating to these subjects as such. The modified bill did, however, continue in almost identical terms, and under almost the exact same limits as the original, the general emergency exemption from the notice and public participation provisions for all rulemaking that needed such treatment because it was "necessary in the public interest." The revision also added an additional general exemption to the notice provision for "minor revisions and refinements of rules." [139]

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[134] *Id.* § 1003(d).

[135] 88th Cong., 1st Sess. (1963). *See S. 1663 Hearings, supra* note 30, at 21.

[136] S. 1663, 88th Cong., 1st Sess. § 4 (1963).

[137] *Id.* § 4(b).

[138] 88th Cong., 2d Sess. (1964. *See 1663 Hearings, supra* note 30, at 1.

The rulemaking section of S. 518 of the Ninetieth Congress [140] was almost identical to the rulemaking section of S. 1336 of the Eighty-ninth Congress, which passed the Senate in 1966.[141] In neither bill did the rulemaking section mention "public property, loans, grants, benefits, or contracts" as such. This meant that rulemaking involving those subjects was governed by the procedures usually required, unless in some particular case it came within one of the express general exclusions added to section 553 in place of the section 553(a)(2) exclusions which had been deleted. The newly added exclusions in S. 518 exempted from every provision of the rulemaking section, including the right to petition subsection, "minor exceptions from, revisions of, or refinements of, rules which do not affect protected substantive rights," and "rulemaking that relates solely to the establishment or revision of monetary rates or policy." [142] Additionally, S. 518 continued in very similar form the generally applicable emergency rules exemption found in both S. 1663 and revised S. 1663.[143]

As a result of hearings held on S. 518 two modifications of that bill were proposed. The first of these was S. 2770,[144] which was similar to S. 518 in every respect relevant to the discussion here, except that it added an additional exemption to help compensate for the elimination of the subsection (a)(2) exclusions under consideration. The added exemption relieved "rulemaking that relates solely to . . . wage determinations" [145] from every provision of the rulemaking section, including the right to petition subsection.

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[139] Revised S. 1663, 88th Cong., 2d Sess. § 4(b) (1964). A permanent exemption, not relevant to this discussion, was also provided for rules relating to foreign affairs and national defense or to internal management or personnel of an agency. *Id.* § 4.

[140] 90th Cong., 1st Sess. (1967). *See S. 518 Hearings, supra* note 30, at 2.

[141] S. 1336, 89th Cong., 2d Sess. (1966) *See S. 518 Hearings, supra* note 30, at 1. The only relevant difference in the rulemaking that relates solely to the establishment or revision of monetary rates or policy" [§ 4(h)(6)] to the other exemptions from § 4 already contained in S. 1336.

[142] S. 518, 90th Cong., 1st Session § 4(h) (1967).

[143] *Id.* § 4(d).

[144] 90th Cong., 1st Sess. (1967).

[145] S. 2770, 90th Cong., 1st Sess. § 553(h)(6)(B) (1967).

The second modification of S. 518 introduced a number of sharp changes from the original. S. 2771 [146] contained all of the exemptions found in S. 518 discussed previously except that relating to minor exceptions or revisions. In addition, it completely and unqualifiedly excluded from every part of the rulemaking section "rulemaking that relates to public contracts." [147] In so doing, it treated "contracts" differently than "public property, loans, grants [and] benefits," which were nowhere referred to in the Act as such. This bill also contained two generally applicable exemptions not present in S. 518. It completely excluded from every requirement of section 553, including the right to petition, "rulemaking that relates solely to the establishment or revision of monetary rates, monetary policy, or other matters, with respect to which notice of proposed rulemaking would seriously impair the effectiveness of the rule." [148] It also exempted from every requirement of section 553 "situations in which the agency finds (and incorporates in the finding a brief statement of the reasons therefor in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." [149]

Prior discussion presents only the general outlines of the most important previous efforts to alter section 553(a)(2). It demonstrates that much consideration has been given to the elimination or modification of these exemptions and that there is substantial agreement that some change with respect to the subsection (a)(2) exclusions is necessary. Most of the above proposals, however, do not present as desirable a solution for the problem at hand as that to be discussed in the next section. There are not narrowly enough tailored to secure the best accommodation of the competing interests involved. Almost all of the prior bills seek to deal with problems arising from the repeal of subsection (a)(2) through the use of new exemptive language, most of which is not demonstrably superior to existing language of section 553 that could be used as efficiently for the same purpose. Consider the following illustrations.

As noted earlier, the continued exclusion of *all* rulemaking relating to contracts, which is a feature of S. 2771, seems unwarranted. Similarly, the express exclusions for "all rulemaking that relates solely to the establishment or revision of monetary rates or policy" as found in S. 518 and S. 2771 may also be overbroad as a rational accommodation of the interests involved. Some rulemaking within this definition might not need to be excluded from the ordinary rulemaking procedures of section 553. For instance, setting the discount rate for banks needs to be done without prior public notice. But a proposed rule limiting the rate of interest that may be paid by member banks of the Federal Reserve System on time or savings deposits to no more than "the applicable maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such member bank is located,"[150] may not need to be exempted from usual rulemaking requirements—even though such a rule may "*relate* solely to the establishment or revision of monetary rates or policy." The exemption for rulemaking that "relates solely to . . . wage determinations" found in S. 2770 may also be overbroad. It not only exempts such rulemaking in an unusual situation like that faced by the Department of Labor, but in all situations, regardless of the particular circumstances of the case. Moreover, it not only exempts the wage determinations themselves, but also all rulemaking that "*relates* solely to" those determinations.

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[146] 90th Cong., 1st Sess. (1967)

[147] S. 2771, 90th Cong., 1st Sess. § 553(h)(5) (1967).

[148] *Id.* § 553(h)(6). The language commencing with "or other matters" is not present in S. 518.

[149] *Id.* § 553(h)(4).

New exemptive language whose function can as easily and efficiently be performed by existing section 553 exclusionary terminology is also plentiful in the above bills. It was inserted to cure the problems resulting from their elimination of present subsection (a)(2). For example, S. 2335 exempts rulemaking where "such public participation would occasion delay or expense disproportionate to the public interest;" S. 1663 exempts rulemaking from usual procedures when they are "unwarranted or contrary to the public interest;" revised S. 1663 exempts all "minor revisions and refinements of rules;" S. 518 enlarges that to an exemption for all "minor revisions and refinements of rules which do not affect substantive rights;" and S. 2771 exempts from usual requirements "matters with respect to which notice of proposed rulemaking would seriously impair effectiveness of a rule." Subsequent discussion should demonstrate that the problems sought to be solved by inserting the above new language as a substitute for the subsection (a)(2) exclusions can easily, and perhaps more satisfactorily, be cured by other exemptive terminology already contained in section 553.

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[150] 12 C.F.R. § 217.3(c)(2) (1969). *See also, e.g., id.* § 217.2 (prohibiting the payment of interest on demand deposits and defining interest for these purposes).

VII. A SOLUTION: SECTION 553(b)(B) AND SECTION 553(d)(3)

According to section 553(b)(B) the provisions of section 553(b)–(c) are inapplicable "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This qualified and limited exemption from two subsections of section 553 deserves careful examination because it may be a satisfactory substitute for the overbroad, unqualified exemptions presently contained in subsection (a)(2).

The exemption found in section 553(b)(B) is narrowly tailored because it requires an administrative assessment of the particular facts and circumstances surrounding each case of rulemaking to which it is sought to be applied. The reports of the Senate and House committees responsible for the APA clearly stated that

> [t]he exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published.[151]

By this, committees intended to establish a restrictive meaning of the terms "when the agency for good cause finds" which precede the enumeration of grounds upon which this particular exemption is available.

Therefore, the agencies are required under this provision to make specific findings, meeting what has been interpreted to be a strict standard, before they can avail themselves of the exemption. Some commentators have argued that the courts should not examine the accuracy of the required administrative finding when the validity of an agency's use of this exemption arises in litigation.[152] However, this finding is judicially reviewable on the same basis as any other finding committed to an agency's judgment.[153] Thus, if the finding is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or is "unsupported by substantial evidence" based on the whole record, it will be set aside and the rule promulgated rendered invalid.[154]

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[151] S. Doc. No. 248, *supra* note 2, at 200, 258. *See also id.* 358 (remarks of Rep. Walter).

[152] *See* R. PARKER, ADMINISTRATIVE LAW 182–83 (1952); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 384–85 (1946).

[153] *See* Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Durkin v. Wagner Co., 115 F. Supp. 118 (E.D.N.Y. 1953) *aff'd per curiam sub nom.* Mitchell v. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955). *See also* National Motor Freight Traffic Ass'n. Inc. v. United States, 268 F. Supp. 90 (D.D.C. 1967). In this last case, it is not clear whether § 553(b)(B) or § 553(B)(A) was involved.

[154] 5 U.S.C. §§ 706(2)(A),(2)(E) (Supp. IV, 1969). *See also* cases cited note 153 *supra*.

Of course, in such cases the presumption of validity will rest, as it always does, with the administrative action, the burden of overturning it resting upon the assailant.

There is one interpretation of section 553(b)(B) which should be rejected at the outset. It can be argued that an agency seeking to come within the section 553(b)(B) exemption must find that it is "impracticable, unnecessary, or contrary to the public interest" for the agency to follow the procedures of subsection (b) in each separate rulemaking case to which it seeks to apply the exemption, and that it cannot make that finding wholesale as to any narrowly tailored class or group of rulemaking situations. This interpretation relies upon certain somewhat ambiguous language in the provision: "*when* the agency for good cause finds (and incorporates *the* finding and a brief statement of reasons therefor in *the* rules issued)." It also relies upon the supposed intention of Congress to provide a means by which individual cases could be separately considered on their own merits, and an exemption granted only in those specific cases in which it was justified on one of the grounds stated.

While the above argument has great merit and is a sound general rule by which to construe section 553(b)(B), it overlooks two points. First, it may be "impracticable, unnecessary, or contrary to the public interest" to follow usual section 553 procedures in every single instance of a specific type of rulemaking under a particular statute, when each such instance is viewed in isolation. In those circumstances it seems a foolish waste to require repetitive and redundant findings and full publication of those findings. As will be explained later, rulemaking setting the discount rate for the Federal Reserve System is an example of that kind of situation.[155]

Second, there are also situations where compliance with the procedures of section 553(b)–(c) is not "impracticable" or "contrary to the public interest" as applied to any single instance of rulemaking on a given subject, but becomes so as to a whole class if those requirements must be followed for *all* such similar instances of rulemaking. For example, so many different rules of a particular type may have to be issued within a short time period that affording notice and an opportunity to participate in every such case would be practically impossible, would frustrate the proper performance of the agency's functions, or would cause other substantial deleterious consequences. The wage determinations made by the Department of Labor under the Davis-Bacon and related acts provide an example of such a situation. Procedures of the type specified in section 553 may not be "impracticable" or "contrary to the public interest" with respect to any one such determination viewed in isolation; but those procedures undoubtedly become so when they must be applied to all such determinations.

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[155] *See* text accompanying note 185 *infra.*

As a result, the exemption contained in section 553(b)(B) should be read to allow an agency to make the requisite finding for a whole class of rulemaking. But this should only be permitted if the agency can either make that finding as to every single member of the class considered separately, or as to every single member of the class because it would be "impracticable" or "contrary to the public interest" to impose section 553 procedures on all members. Of course, agencies must be required to draw their classes for this purpose as narrowly as possible in order to exclude no more under this exception than is absolutely justifiable in terms of the statutory criteria. Overbreadth of any kind in the drawing of such a class of rules should not be tolerated. Consideration might also be given to shifting the burden of proof to the agency with respect to such group as opposed to individual case delineations, thus forcing the agency to justify its definition of a "class" of rulemaking sought to be excluded from usual procedures. Such a limitation, however, may not be necessary and may have some undesirable consequences.

The grounds specified in section 553(b)(B) upon which an agency may dispense with the usual rulemaking procedures are stated in the alternative, so that any one of the three grounds listed is sufficient to invoke the exemption.[156] The first ground upon which the qualified exemption becomes available is when the notice and participation requirements of section 553 are found to be "impracticable." Webster defines the term as meaning, among other things, "infeasible," "impractical, unwise, imprudent." [157] Earlier drafts of the APA would have made the exemption available when the public rulemaking procedures were "impracticable because of unavoidable lack of time or other emergency," [158] but the qualifying language after "impracticable" was subsequently dropped. The Senate and House reports on the APA stated that "impracticable" means a situation "in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings." [159]

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[156] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 30.

[157] WEBSTER'S NEW INTERNATIONAL DICTIONARY 1136 (3rd ed. 1966).

[158] S. Doc. 248, *supra* note 2, at 140, 148, 157. *See also id.* 181. The version at 181 reads, "impracticable because of unavoidable lack of time or other emergency affecting public safety or health."

The term "unnecessary," which is the second exemptive ground specified in section 553(b)(B), connotes something which is "not necessary: useless, needless." [160] The legislative history indicates that it must be unnecessary "so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved." [161] On this basis one court seems to have concluded that "unnecessary" applies to situations in which an agency rule is "minor or emergency in character," [162] or " 'a routine determination,' 'insignificant in nature and impact,' and unimportant 'to the industry and to the public.' " [163]

Rulemaking is also exempted by section 553(b(B) from advance notice and public participation when adherence to those procedures would be "contrary to the public interest." According to the APA's legislative history, this phrase "supplements the terms 'impracticable' or 'unnecessary'; it requires that public rulemaking procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure." [164] The *Attorney General's Manual* takes the position that " 'public interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice." [165]

At some point during their legislative history all three terms—"impracticable," "unnecessary," and "contrary to the public interest"—were referred to as operating "only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary" [166] and as exempting "situations of emergency or necessity." [167] However, the weight of their legislative history, as well as their language, clearly establishes that these terms were not meant to be so narrowly limited. At the same time it must be remembered that these are qualified grounds for exemption and are not to be construed more broadly than the demands of sound government administration and wise public policy require. It is worth repeating that the section 553(b)(B) exemption is "not an 'escape' clause in the sense that an agency has discretion to disregard its terms or its facts."[168] An agency can use this exemption only if it has "good cause" within the provisions of the Act.

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[159] *Id.* 200, 258. *Accord*, ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 30.

[160] WEBSTER'S NEW INTERNATIONAL DICTIONARY 2504 (3rd ed. 1966).

[161] S. Doc. No. 248, *supra* note 2, at 200, 258. *See also* ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 31.

[162] Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969).

[163] *Id.* at 743 (citing National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90, 95–96 (D.D.C. 1967).

[164] S. Doc. No. 248, *supra* note 2, at 200, 258.

[165] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 31.

[166] S. Doc. No. 248, *supra* note 2, at 358.

[167] *Id.* 200, 258.

A more detailed description of how the section 553(b)(B) exemption might operate in practice will demonstrate that it could satisfactorily handle the problems resulting from a repeal of section 553(a)(2)—and do so on the basis of a rational accommodation between the need for public participation in rulemaking on the one hand, and the need for efficient, effective, expeditious, and inexpensive government administration on the other. Although the terms "impracticable," "unnecessary," and "contrary to the public interest" overlap to some extent, an effort will be made, insofar as possible, to examine their applications separately. But it should be remembered that in light of the very close relationship between these terms, the following analysis of their applications should also be considered as partially overlapping.

Consider the exemption for situations where public procedures are found to be "unnecessary." This could undoubtedly perform the function intended by the exception for "minor revisions and refinements of rules" found in several of the bills discussed earlier, and probably more satisfactorily so because the existing term may be more narrowly tailored. For example, the "unnecessary" exemption seems to cover situations where a rule involved is in fact of such a minor nature, like the rule requiring government loan instruments to be signed in ink, that public procedures would be a predictable and indisputable waste. Also under this "unnecessary" exemption, public procedures may be dispensed with for rules announcing the exact penalty rates applicable to the marketing of certain commodities in excess of the farm-marketing quota. The Department of Agriculture's action in those cases only involves a mathematical computation, the statute specifying that the rates are to be a certain percentage of parity or support price of the commodity as of a particular date.[169] Similarly, usual rulemaking procedures are also "unnecessary" for mere technical changes in regulations. If, for example, the statute citations contained in a regulation must be altered to conform to changes in the numbering of the *United States Code*, or regulations are rewritten or reorganized purely for style, with no substantive changes, public procedures are obviously "unnecessary."

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[168] *Id. See* text accompanying note 152.

[169] 1957 House Study, *supra* note 51, at 26–27.

On the other hand, under this exemption agencies should not be permitted to decide lightly that public procedures are "unnecessary." In *Texaco, Inc.* v. *Federal Power Commission*[170] the Third Circuit Court of Appeals considered an FPC regulation which had been promulgated without resort to the public procedures of section 553(b)–(c). The regulation required natural gas companies to pay a compound interest rate, for the first time, on all amounts refunded to their customers because of overcharges resulting from new rates subsequently found to be unjustified. After considering all of the Commission's arguments, the court held that the rule was invalid because of the failure to follow section 553(b)–(c) procedures in its promulgation.

The court in *Texaco* explained that "the rule does not fall within the 'unnecessary' exception relied on by the Commission since it cannot be classified as either minor or emergency in character."[171] The court refused to accept the argument that the section 553 procedures were "unnecessary" because they found that "the compound rate would affect numerous jurisdictional gas companies and potentially involves large sums of money."[172] The court also expressly rejected the Commission's contention that the procedures were "unnecessary" because the new rule imposed no obligation on affected parties that could not have been imposed on them by ad hoc adjudicatory orders in each case. "The crucial fact is that the Commission elected to proceed in the case by making a general rule and, when engaged in rulemaking, it must comply with the procedural requirements imposed on rulemaking by the Administrative Procedure Act, which it failed to do. . . ."[173]

By holding as it did, the court in the *Texaco* case seems to have taken the position that the ability of an agency to achieve the same result as a rule by another means, such as through ad hoc adjudication, does not make the requirements of section 553 (b)–(c) "unnecessary" when the agency in fact elects to achieve that result through rulemaking. This is not the place to fully explore the wisdom of that result.[174] However, a number of general points are worth making here. The result in *Texaco* can be justified in light of the fact that the APA favors public participation in rulemaking in all cases except those where very good reasons preclude it; the fact that the rule was not minor in its effects, and had a large financial impact on many companies;[175] and the fact that the agency did make a conscious choice to proceed by rulemaking which would result in an order of general applicability rather than by an ad hoc order in each case.[176] On the other hand, one of the undesirable effects of this decision may be to discourage the use of general rules in favor of ad hoc adjudication, a result which is usually contrary to the sound administration of regulatory policies.[177]

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[170] 412 F.2d 740 (3d Cir. 1969).

[171] *Id.* at 743.

[172] *Id.*

[173] *Id.* at 745.

[174] *Cf.* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (holding an agency order issued to a party in the course of an adjudicatory proceeding valid and enforceable, even though the same requirement announced in the course of an adjudication as a prospective rule only would be void because it failed to follow the rulemaking requirements of § 553). *See generally* Comment, Wyman-Gordon *and the* Excelsior *Rule*, 117 U. PA. L. REV. 621 (1969).

The "unnecessary" exemption should not allow agencies to avoid section 553 procedures merely on the ground that a rule is "minor" or "unimportant" because it only has a small impact on a very limited segment of the public. It is wise to have well-informed decision-making and citizen-participation in government rulemaking which has a relatively small impact on limited segments of the public, as well as in those actions which have a great impact on large portions of the public. Consider the following case, for example.

> One congressional office got a host of complaints from people, not only in that area, but throughout the country, on an unimportant rule which an agency had made without any public notice or hearing, related to public property. It related to how many pounds of petrified wood you could take off the premises of a national reservation of some type. And this agency had thought—well, it is a terrible thing to lose all these hunks of stone, so they—within their own internal organization, they came up with one pound, or something like that.
>
> This provoked all this correspondence to Congress.
>
> So the congressional people involved went down to the agency . . . [which] said—"Oh, well, we realize we made a mistake, we will raise it to five pounds." So the congressmen went back and said we solved the problem. The agency said yes, very unimportant.
>
> Well, that provoked ten times more mail than came in the first time, because it turned out that five pounds just didn't qualify under the standards by which petrified wood is traded in the market of . . . collectors . . . It has to be a bigger poundage.
>
> Well, the moral of that particular story was that this supposedly minor rule . . . turned out to be important to a lot of people in this country, and the fact that the agency did not give public noice, and give the public

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[175] 412 F.2d at 743 n.7.

[176] *Id.* at 744 n.9.

[177] *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). *See also* Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis L. Rev. 95; Shapiro, *The Choice of Rule-making or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

> a chance to express its opinion, caused a heck of a lot of trouble for an awful lot of people.[178]

The "impracticable" exemption could adequately deal with a number of different situations in which a requirement of advance notice of rulemaking and public participation therein would be unreasonable. In cases of emergency where a rule is needed immediately in order to avoid injury or frustration of a program's objectives, the usual section 553(b)–(c) procedures can be disregarded because they are "impracticable." According to the *Attorney General's Manual*, for example, "the Civil Aeronautics Board may learn, from an accident investigation that certain rules concerning air safety should be issued or amended without delay; with the safety of the traveling public at stake, the Board could find that notice and public rule-making procedures would be 'impracticable,' and issue its rules immediately." [179] Similarly, where haste is needed, safety rules applicable to trucks and railroads, and rules regarding the marking, packing, and handling of dangerous items like explosives on such carriers, must also be permitted to avoid the usual procedures set out in section 553 (b)–(c) on the grounds that such procedures are "impracticable." [180]

The Department of Agriculture has properly stated that the same rationale is equally applicable when the Department must impose or modify animal or plant quarantines promptly to prevent the spread of diseases or insect pests; or when the Department makes orders under the Packers and Stockyards Act of 1921 to continue temporary rate schedules previously authorized after notice and an opportunity to be heard, if prompt action is necessary to avoid a reversion to rates and charges that are unrealistic in light of existing economic conditions; or when the Department finds that last minute changes are necessary in acreage allotments and marketing quota regulations under the Agricultural Adjustment Act of 1938, because farmers must know of such changes prior to planting.[181] To force adherence to the procedures of section 553 in any of these situations would be "impracticable" because time is of the essence.

Consider also the situation presented in the case of *Durkin v. Edward S. Wagner Co.*[182] In a prior decision involving the same parties, the court had held that particular workers were not covered by certain regulations under the Fair Labor Standards Act. This holding was contrary to the interpretation and practice of the Administrator of the Wage and Hour Division, an interpretation known and relied upon by the industry involved. As an immediate response to this decision, and without resort to usual rulemaking procedures, the Adminstrator promulgated a rule which included those workers within the relevant regulations.

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[178] ABA Symposium on S.1336, Washington, D.C., Dec. 1, 1966, Transcript 110–11.

[179] ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 30–31.

[180] 1957 HOUSE STUDY, *supra* note 51, at 1769 (Interstate Commerce Commission).

[181] *Id.* 26–27. *See also* Dighton v. Coffman, 178 F.Supp. 114 (E.D. Ill. 1959), *aff'd* 279 F.2d 497 (7th Cir. 1960).

[182] 115 F. Supp. 118 (E.D.N.Y. 1953), *aff'd per curiam sub nom.* Mitchell v. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

When he issued the new rule, the Administrator stated that it would be "impracticable, unnecessary, or contrary to the public interest" to follow usual rulemaking procedures in the making of this "clarifying" regulation. "[I]mmediately effective clarification of the regulations is essential in order to accomplish the intent of the present regulations to safeguard the wage standards in the industry, to eliminate the unfair competitive situation, and to provide for adequate enforcement of the home work restrictions." [183] On the basis of this evidence, and the absence of any evidence to controvert it, the court held that the rule involved was properly treated as within the section 553(b)(B) exception.[184]

The court's result seems justifiable because any delay in promulgation of the rule would have encouraged employers to abandon their previous adherence to the Administrator's interpretation of the earlier rule until a new rule to the same effect was formally adopted. This would have hurt countless employees who had come to rely on the fruits of the prior interpretation. It also would have injured those employees who chose, despite their competitors' contrary action, to keep their wages at the levels demanded by the earlier interpretation of the Administrator during the period in which the new rule was being adopted with public procedures.

Either the "impracticable" or "contrary to the public interest" exemption, or both, must be deemed to cover rulemaking relating to the debt management functions of the Treasury when notice and public participation would result in frustration of the Department's operations in that regard, or in other undesirable consequences. Either of those exemptions could also cover rulemaking such as that determining "discount rates established by Federal Reserve Banks, and changes in general requirements regarding reserves of member banks, maximum interest rates on time and savings deposits, or credit for purchasing or carrying securities." The delay involved in according prior notice and public participation in those cases would ordinarily "prevent the action from becoming effective as promptly as necessary" to meet current economic exigencies, thereby making such procedures "impracticable" under those circumstances. The delay involved in adherence to usual procedures might also "permit speculators or others to reap unfair profits or to interfere with the Board's action taken . . . ." [185] The next exemption to be discussed focuses on these latter problems.

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[183] *Id.* at 122.

[184] *Id.* at 122–23. On appeal the court said:

> Judge Galston has found that the defendant's operations fall within the amended regulations and that the regulations were properly promulgated under the Administrative Procedure Act, 5 U.S.C. § 1003(a) D.C.E.D.N.Y. 115 F. Supp. 118. We see no reason to overturn his well-reasoned conclusions. While there was no advance notice of the amendment, yet that was not necessary, both because of its nature as an "interpretive" rule and because of the Administrator's finding of "good cause" for immediate action, based upon the fact that other employers in general were complying with this interpretation of the Act and defendant had long known of the view held by the Administrator.

217 F.2d at 304.

An agency can ignore usual rulemaking procedures under section 553(b)(B) whenever advance notice would tend to defeat a rule's purpose because in such situations those procedures would certainly be "contrary to the public interest." [186] The function sought to be performed by the exemption found in one of the bills discussed earlier for "matters with respect to which notice of proposed rulemaking would seriously impair effectiveness of a rule," is adequately performed by the existing "contrary to the public interest" terminology. For example, the Securities and Exchange Commission "has often deemed it inadvisable to submit a proposed regulatory rule to the industry because of the danger that certain companies might take advantage of the interim period to effect transactions which the rule is designed to prevent or control and thus escape the intended regulation of conduct altogether." [187]

The Department of Commerce has reported that "[i]n the exercise of [its] priority and allocation functions [under the Defense Production Act of 1950], speed in the issuance of orders and regulations is often essential as prior notice of proposed governmental action would tend to defeat the purpose intended to be accomplished thereby. For example, notice of intention to place certain materials under production control or to limit acquisition thereof might create panic buying in an effort to get the jump on the regulation and on competitors." [188] In such cases the Bureau of Defense Services Administration properly invoked the section 553(b)(B) exemption on the grounds that adherence to usual procedures in that situation would be "contrary to the public interest." [189] Similarly, the Department of Interior rule placing a moratorium on applications respecting the public lands, would also fit within the exception.

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[185] 12 C.F.R. § 262.2(e) (1969). *See also S. 518 Hearings, supra* note 30, at 366–67.

[186] *See 1941 Hearings, supra* note 17, at 812. *See also* ATTORNEY GENERAL'S MANUAL, *supra* note 11, at 31.

[187] B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 62 (1958).

[188] 1957 HOUSE STUDY, *supra* note 51, at 115.

There is also no reason why the "contrary to the public interest" language of section 553(b)(B) cannot be used satisfactorily to work an overt accommodation between the need for public rulemaking procedures on the one hand, and the need for inexpensive, expeditious, effective, and efficient government administration on the other. The function performed by language like "occasion delay or expense disproportionate to the public interest," which appeared in one of the bills discussed previously, can easily be performed by balancing the relevant considerations under a standard such as "contrary to the public interest."

The "contrary to the public interest" terminology should allow the Department of Labor an exemption for the wage determinations it makes under the Davis-Bacon and related acts. Because of the especially large number of such "rules" that the Department must continually make during a limited period, required adherence to usual rulemaking procedures in that situation would cause an unusually large delay and/or increase in costs of all kinds. These extraordinary deleterious consequences resulting from the peculiar facts of the administration of this program outweigh any positive good that might result from requiring adherence to normal rulemaking procedures. The existence of seemingly successful alternative procedures to provide interested persons with adequate notice of, and a chance to contribute views in relation to, those wage determinations eliminates any possibility that the Department should have to adhere to section 553 procedures in this situation.[190]

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[189] *Id.*

[190] *S. 518 Hearings*, *supra* note 30, at 92, 95 (statement of the AFL-CIO). In addition, the Solicitor of Labor stated:

> The actual wage determination procedure is initiated by the procurement agency, which submits its request for a finding of wage rates prevailing in the locality of the proposed project for the various classes of laborers and mechanics whose employment is required.
>
> The request is usually made about thirty days before any advertisement of specifications or the beginning of negotiations, as the case may be.
>
> Where the information on hand as a result of the continuing program referred to is sufficient to make findings, a decision is made.
>
> If the information is not sufficient, a field survey is made. In the course of the survey, local labor organizations, contractors, contractors' groups and public agencies are contacted. Hearings may also be held in order to amplify further the record upon which findings are to be based.
>
> When the findings are made, and the wage determination is issued to the requesting agency, copies of the wage determination are promptly sent to labor organizations and contractor associations with the understanding that they will be distributed to any local affiliates which may have an interest in the wage determination. This is done in order to

Similarly, the "contrary to the public interest" standard found in section 553(b)(B) should permit exemptions for other extraordinary situations. Where the delay and costs involved are in fact so very large, due to the special facts of the case, that they outweight the strong public interests favoring adherence to usual rulemaking procedures, an exception could be allowed. More than just "any increase in cost or delay" will be necessary to justify such an exception under the "contrary to the public interest" standard. The facts will have to demonstrate that an atypically large delay or increase in cost will result from adherence to normal rulemaking procedures, and that the extraordinary delay or cost is not outweighed by the benefits of adherence to those usual procedures. Situations of this sort will be relatively few. Those increased costs and delays which are ordinarily to be expected are properly treated by the Act as an acceptable quid pro quo for the important benefits achieved by requiring advance notice and public participation under section 553.

Section 553(d)(3) should perform the same function for section 553(d) as section 553(b)(B) performs for section 553(b)–(c). According to section 553(d)(3), an agency can dispense with the section 553(d) required publication or service of a substantive rule at least thirty days before its effective date, whenever the agency decides to do so "for good cause found and published with the rule." This "good cause" exemption should give agencies at least as much discretion to avoid the application of section 553(d) in appropriate cases as the "impracticable, unnecessary, or contrary to the public interest" exemption gives them to avoid the application of section 553(b)–(c). Indeed, the former may give agencies even more discretion than the latter because the guiding terms "impracticable, unnecessary, or contrary to the public interest" are conspicuously absent from section 553(d)(3).

Nevertheless, in order to make the requirements of section 553

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afford interested persons an opportunity to present timely requests for changes in the wage determination upon the basis of any evidence that they may have.

Interested persons may appeal for review of wage determinations by the Department's Wage Appeals Board, which is empowered to pass upon all questions of law and fact.

Substantive changes may be made in wage determinations without exception up to the ten-day period before the opening of bids for the construction work. Thereafter, and until the award of the contract, a substantive change may be made only where the procurement agency finds that there is a reasonable time in which to notify the bidders of the change.

Id. 240.

In those cases in which the Department serves personal notice of the wage determinations on the parties "subject thereto," or those parties have notice thereof as provided by law, the Department can dispense with the usual advance notice and public participation requirements because of § 553(b), and need not even rely on a modified § 553(b)(B). *See also* text accompanying note 203 *infra.*

(d) meaningful, the exemption from its terms should be construed to be as broad, but no broader, than section 553(b)(B). If that is so, the "good cause" required by section 553(d)(3) must, like the "good cause" required by section 553(b)(B), be predicated on a finding that adherence to usual procedures is "impracticable, unnecessary, or contrary to the public interest." The legislative history of the "good cause" exception in section 553(d)(3) supports the conclusion that the two exemptions should be treated as congruent. The House Report on the APA states that:

> [This] exception—upon good cause found and published—is not an "escape clause" which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding. Many rules . . . may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation.[101]

Previous discussion should demonstrate that if the section 553(a)(2) exemptions under consideration were eliminated, the exclusions found in section 553(b)(B) and section 553(d)(3) could adequately handle any peculiar problems created thereby. Where a rational balancing of the relevant interests would indicate the desirability of an exception from the requirements imposed by section 553(b)–(d) for particular rulemaking, the above "good cause" exemptions could suffice to achieve the result.

No special exemption is needed from the right to petition provision of section 553(e) if the subsection (a)(2) exclusions are repealed. Interested parties should always have the right to petition for the issuance, amendment, or repeal of a rule. As noted earlier, the only obligation which that right imposes on an agency is the duty to follow its own rules with respect to such petitions, and the duty to respond under section 555(e) by giving "[p]rompt notice . . . of the denial in whole or in part of a . . . petition . . . accompanied by a brief statement of the grounds for denial." If the need arises, an agency may respond to a group of similar petitions as an entity. Consequently, no situation involving one or more petitions for a rule relating to the subsection (a)(2) subjects would seem to require even a qualified exemption from section 553(e). Currently no exemption from the right to petition requirement is deemed necessary for any rulemaking already subject to the terms of section 553. In light of the importance of that right, and the minor burden it imposes on agencies, this position seems fully justifiable.

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[101] S. Doc. No. 248, *supra* note 2, at 260. *See also id.* 201; Buckeye Cablevision, Inc., v. F.C.C., 387 F.2d 220, 228 n.34 (D.C. Cir. 1967).

If the right to petition continues unhampered by any exceptions even after the subsection (a)(2) exemptions are removed, an important salutary consequence will follow. In every case where usual public procedures are dispensed with prior to the promulgation of a rule because the qualified exemptions of section 553(b)(B) are applicable, interested parties will have an effective chance to express their views on that rule subsequent to its enactment. They can file a petition for the amendment, repeal, or modification of the rule in question, including a statement of their reasons therefor. The agency will then be obliged to respond, as section 555(c) requires, with "[p]rompt notice . . . of the denial in whole or in part of . . . [the] petition . . . accompanied by a brief statement of the grounds for denial," unless it affirms a prior denial or the denial is self-explanatory. It should be recalled that the previously discussed bills to reform section 553 required initiation of public procedures within a stipulated period after an emergency rule was promulgated in order to continue its effectiveness. Such an approach has merit in assuring public participation subsequent to a rule's issuance in those cases in which it was impossible beforehand. The right to petition should provide some of the same protection.

The section 553(b)(B) and section 553(d)(3) exemptions impose a special obligation of disclosure on agencies utilizing those provisions. An agency must incorporate in the rules issued without following usual procedures the necessary statement of "good cause" predicated upon a finding that adherence to section 553(b)–(d) is "impracticable, unnecessary, or contrary to the public interest"; it must also include a brief statement of the reasons for that finding. In cases where the exemption is utilized based on a finding with respect to a whole class of cases, only one such full publication relating to the whole class should be required. Rules in that class subsequently issued without resort to usual procedures would only need to refer to the prior full publication of findings and reasons, and give its citation. To be of value, the reasons listed in the rules as justification for the failure to follow usual procedures must, of course, be fairly specific. Declarations in the language of the Act will not satisfy this requirement and should be deemed inadequate under the statute. At the same time the required statement of reasons need not be so detailed as to be unduly onerous.

The above disclosure obligation will have two salutary effects.

First, such a requirement will force the agency to consider very carefully its reasons for each such action. Second, by requiring an official statement of the agency's reasons for using the exemption, judicial review of that action will be facilitated. If such action is challenged in a judicial proceeding, the court can test its validity against the reasons provided in the prior publication. Having stated the reasons for their conduct in this regard both formally and publicly, agencies will presumably not be allowed to assert others as justifications if the ones originally given prove to be inadequate. This should keep agencies both thoughtful and honest in the use of this exemption.

The survey prepared specially for this study asked all federal agencies the following question:

> Why are the several specific exemptions currently contained in § 553(b)-(e) insufficient to deal with any disadvantages that might be encountered by your department or agency if all of § 553(a)(1)-(2) was repealed? Among these specific exemptions just referred to is that contained in § 553(b)(B) providing that public notice of rulemaking and participation by interested persons in rulemaking is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Agencies making rules presently exempted by subsection (a)(2) from section 553 responded in various ways to this question. These responses, and the following discussion of section 553(b)(B), may also be considered applicable to the section 553(d)(3) exemption since, as noted earlier, the requirements of that exemption are probably congruent with those of section 553(b)(B).

Some respondents to the above question insisted that the section 553(b)(B) exemption was an insufficient substitute for subsection (a)(2) because the latter is necessary as it is, and the former is not as broad as the latter.[192] Responses of this sort are of little help in evaluating the impact that the proposed changes may have, and they in no way detract from the solution previously suggested. They amount to no more than an insistence that section 553(a)(2) is necessary, and that nothing less is acceptable, without any explanation why other existing exemptions, including section 553(b)(B), are inadequate substitutes for the subject matter exemptions of subsection (a)(2).

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[192] 1969 Survey, *supra* note 27 (responses of Atomic Energy Commission; Post Office; Forest Service and Soil Conservation Service, Department of Agriculture). For example, the Post Office stated:

> It is considered that the specific exemptions contained in Sec. 553(b)-(e) are not well adapted to serve as substitutes for the subject area exemptions. It is believed that the exemption stated in Sec. 553(a)[2] reflects a proper and generalized findiing that the provisions of Sec. 553(b)-(e) are not appropriate for rulemaking in these subject matter areas and that the reasons underlying this will continue despite repeal of Sec. 553(a)[2].

A frequent objection to section 553(b)(B) as a substitute for section 553(a)(2) is that making the findings required by the former would constitute too great an administrative burden on the agencies.[193] For example, the Department of Defense stated that "admittedly, the exemption is a broad one in which DoD would rely in issuance of any highly significant rule. . . . But the scope and volume of substantive rulemaking in the Department makes impracticable compliance with the unwieldy requirement for a 'finding and a brief statement of reasons' for the 'good cause.' "[194] In light of the fact that the statement of findings and reasons is only required in those cases in which the agency opts out of the usual procedures, and that it can be made for a whole class of rulemaking in the few instances where that can be justified on the basis of the special facts and circumstances discussed previously, this objection seems unsound. The burden involved here consists only in the agency setting down, in each situation where justified, the finding that public procedures are "impracticable, unnecessary, or contrary to the public interest," and a brief statement of the reasons why that is so. To some extent agencies should be doing that in any case—if they are in fact living up to their more general responsibilities to accord as much participation in rulemaking as possible, consistent with their other obligations. The burden, therefore, seems to be both of a kind and quantity that the agencies should be willing and able to bear in light of the attendant benefits.

A number of responses to the above question gave another reason why current exemptions contained in section 553(b)–(e) are inadequate substitutes for the subject exemptions of section 553(a)(2). It is said that the scope of section 553(b)(B) is unclear and uncertain. Reliance upon that exemption, therefore, would not clearly handle all the problems created by repeal of section 553(a)(2); and it would probably result in much litigation as to the scope of the subsection (b)(B) exemption, causing undue delay in the execution of agency programs and the like.[195] "Uncertainty about the scope of the exemption" and the fact that "such a finding [as is required by section 553(b)(B)] is subject to challenge in the courts making uncertain the validity of any rule issued under this exemption" was noted.[196] The Department of Agriculture's Rural Electrification Administration responded that the attendant possibilities for delay could be too easily utilized by one who wanted to obstruct one of the agency's programs.[197]

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[193] 1969 Survey, *supra* note 27 (responses of Department of Defense; FHA Commodity Stabilization Division, Department of Agriculture; Veterans' Administration; Small Business Administration; Office of Economic Opportunity).

[194] 1969 Survey, *supra* note 27.

[195] 1969 Survey, *supra note* 27 (responses of Small Business Administration; REA, Department of Agriculture; Department of Commerce; Department of Defense).

It is true that the terms "good cause" and "impracticable, unnecessary, or contrary to the public interest" are not as precise as those which categorically exempt all rulemaking "relating to . . . public property, loans, grants, benefits, or contracts." The former terms are more difficult to apply. They involve some balancing because of the required special assessment of the facts in each case. Therefore, their application is not as obvious or indisputable as that of section 553(a) (2).

Nevertheless, as previously noted, the language of section 553(b) (B) can adequately deal with all of the problems created by a repeal of section 553(a) (2). It need not be as unclear as the opponents in this area claim. If section 553(a) (2) is repealed, a legislative history could also be created to clarify further the scope of section 553(b) (B). Moreover, litigation of the scope and proper applicability of "good cause" and "impracticable, unnecessary, or contrary to the public interest" is not apt to be any more endless or obstructive here than it is elsewhere. And in light of the above discussion, it is not in fact likely, in the overwhelming number of cases, to have any significant impact on the agencies' ability to perform their functions properly. Stare decisis should have a substantial effect within a brief time. It should also be noted that although wise and honest use of the section 553(b) (B) exemption by the relevant agencies will not forestall all litigation, it will forestall some.

In the end, however, it must still be admitted that there remains a real difference in clarity between the applicability of section 553(a) (2) and section 553(b) (B), and that some delays may be caused by litigation involving the latter. But these consequences are a price worth paying for the largely increased scope of the guarantee of public participation in rulemaking involved. After all, no showing has been made that they will have any serious ill effects in the mass of cases. If the fear really is that agencies will have to be careful in utilizing this qualified exemption, and that their hands will be tied by it to some extent, they are right. Similarly, if the fear is that in particularly close cases, the form of this exemption will cause agencies to utilize normal rulemaking procedures rather than risk possible litigation resulting in invalidation of the rule,[198] that too is correct. Both of these results, however, are acceptable in light of the importance of the policy favoring public participation in rulemaking.

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[196] 1969 Survey, *supra* note 27 (response of Department of Defense).

[197] Just as the uncertainty of the scope of the other exemptions of Sec. 553(b)-(e) invites litigations which could be used . . . to obstruct the proper functioning of the agency . . . so this good cause exemption could invite obstructive litigation. For example, Sec. 553(b) (B) requires a brief statement of the reasons for finding the notice and public procedure impracticable, unnecessary or contrary to the publiic interest. The sufficiency of the agency's reasons might be attacked in a suit. Whether or not REA's action iis ultimately sustained, the litigation in the meantime could defeat the purpose of the REA loan. 1969 Survey, *supra* note 27.

A number of very important agencies from the point of view of the section 553(a)(2) exclusions admitted that the consequences resulting from a repeal of those exemptions could be handled by the remaining exemptions contained in section 553(b)–(e). The Department of Health, Education and Welfare noted that "the several specific exemptions contained in section 553(b)–(e) are sufficient to deal with the bulk of disadvantages that might be encountered if section 553(a)(1)–(2) were repealed." [199] In light of those other specific exemptions, especially section 553(b)(B), the Department of Transportation said that it "could live" with the repeal of the subsection (a)(2) exemptions under discussion and "would not object to [their] . . . repeal." [200] Similarly, the Department of Labor stated that the repeal of the exemptions relating to "public property, loans, grants, benefits, or contracts" would cause that agency "no undue hardship in view of the specific exemptions contained in section 553(b)(B)." [201] It did express an exception, however, based on the assumption that its wage determinations problem might not be solved adequately by the latter exemption as it is now deemed to operate. Since the revised section 553(b)(B) proposed here would enable the Department to solve this problem for that whole class of rulemaking by one operation, their doubts should be assuaged.

The same should be true of the Treasury Department. It admitted that

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[198] The Department of Agriculture's Farmers Home Administration feared that reliance solely upon the § 553(b)(B) exemption might discourage issuance of rules and needed changes in rules. *See* 1969 Survey, *supra* note 27. This consequence seems highly improbable. More likely is the consequence noted in the text above.

[199] 1969 Survey, *supra* note 27. *See also* the following responses to the 1969 Survey. The National Aeronautics and Space Administration stated: "On balance . . . NASA should not find itself greatly disadvantaged by a removal of [§ 553(a)] . . . ." NASA went on to note that the exemptions presently contained in §§ 553(b)–(e), especially § 553(b)(B) "should be adequate to prevent unreasonable, costly and empty exercises in rulemaking procedures from resulting." The Office of Economic Opportunity admitted that "the good cause exemption would of course serve as some protection against the undue formalism of the A.P.A. rulemaking procedures"; but it opposed repeal of § 553(a)(2).

[200] 1969 Survey, *supra* note 27. The Department said, however, it would object to repeal of the "agency management and personnel" exemption of subsection (a)(2).

[201] 1969 Survey, *supra* note 27.

> if all of Section (a)(1)-(2) was repealed, in the preparation of regulations which could not be published until announced by the Secretary, and in which speed and its requisite corollary secrecy, are necessities, and advanced publicity and public participation opportunities, impossibilities, we recognize that we could resort to publication in our rule of a finding that notice and public procedures are contrary to the public interest.

But the Department was still concerned because it thought "an amendment of the nature indicated by this question does not take into account the continuing functions of the Treasury in its debt management operations."[202] As noted earlier, to the extent that usual procedures are in fact "impracticable, unnecessary, or contrary to the public interest" with respect to rulemaking involved in those functions, the Department has no cause for concern. However, to the extent that concern is a product of a desire for a broader exemption, the equities involved suggest it should not be honored.

None of the objections stated to an "impracticable, unnecessary, or contrary to the public interest" type solution to the problem under consideration has sufficient merit to discourage utilization of that approach. Consequently, a repeal of the section 553(a)(2) exemptions "relating to public property, loans, grants, benefits, or contracts" accompanied by a construction of section 553(b)(B) and section 553(d)(3) along the lines suggested would be an excellent means by which to reconcile the conflicting societal interests involved. The exemptive language should not and need not be so broadly construed as to render it a meaningless limit on agency discretion forestalling adequate public participation in rulemaking, nor so narrowly construed as to render it an ineffective tool to deal with the real problems which admittedly might be faced by certain agencies if section 553(a)(2) was repealed.

As noted earlier, this kind of qualified exemption will remove from the requirements of the rulemaking section virtually all of those situations now used to justify the across-the-board unqualified exceptions presently contained in section 553(a)(2). Unlike the latter provision, however, the former has the advantage of excluding from the strictures of section 553(b)-(d) only those specific rulemaking situations where competing interests of a high order clearly outweigh the interests in public participation.

Furthermore, repeal of the section 553(a)(2) exemptions in question will also be advantageous because the competing values involved will be more adequately accommodated in another way.

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[202] *Id.*

Unlike the current unqualified exemption of subsection (a)(2) rulemaking from every provision of section 553, the solution proposed would only exempt particular instances of such rulemaking, where essential, from the specific subsections whose application would be unreasonable in those instances. So, even if prior public participation under section 553(b)–(c) should be eliminated in a particular case of rulemaking, the agency will still be required, as section 553(e) unqualifiedly demands, to give persons a right to petition for the issuance, amendment, or repeal of a rule. As noted previously, exemption from that requirement seems never to be justified.

One final point with respect to the scope of the statutory reform proposed here deserves note. Rulemaking is defined by the APA as the process for formulating "agency statements of *general* or *particular* applicability and future effect designed to implement, interpret or prescribe law or policy . . . ." [203] The procedures of section 553 are better adapted to dealing with rulemaking of general applicability than to dealing with rulemaking of particular applicability. Therefore, requiring adherence to the procedures of section 553 in the case of the latter class of subsection (a)(2) rulemaking may create larger burdens and smaller benefits than requiring adherence to those procedures for similar rulemaking of general applicability.

However, by using one of two exemptions, an agency can avoid the trouble of opening too wide the role of public participation in rulemaking of particular applicability. To the entent that it is more "impracticable, unnecessary, or contrary to the public interest" to follow normal procedures for subsection (a)(2) rulemaking of particular applicability than for such rulemaking of general applicability, the section 553(b)(B) and section 553(d)(3) exemptions can adequately handle the problem. As a result, one may expect greater resort to the section 553(b)(B) and section 553(d)(3) exemptions for subsection (a)(2) rulemaking of particular applicability than for such rulemaking of general applicability.

Furthermore, section 553(b) permits agencies to avoid prior publication of notice in the *Federal Register* if "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." This means that after the repeal of section 553(a)(2), agencies will still not be required to publish advance notice of such rulemaking of particular applicability in the *Federal Register* if they only do what is fair in any case: give the persons "subject thereto" personal notice and "an opportunity to participate in the rulemaking through submission of written data, views, or arguments." This seems to be the result of a reconciliation of the language "persons subject thereto" in section 553(b) and "interested persons" in section 553(c).

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[203] 5 U.S.C. § 551(4) (Supp. IV. 1969) (emphasis added).

To continue the section 553(a)(2) exclusion as applied to rulemaking of particular applicability would mean that rules of this sort would be subject neither to the statutory provisions governing rulemaking procedure nor to the statutory provisions governing adjudicatory procedure. This result would be most unfortunate. Some clear statutory protection ought to be given affected parties in situations where agencies make rules of particular applicability relating to "public property, loans, grants, benefits, or contracts." The particular persons involved have much at stake, and the public interest in assuring that the official decision-makers are adequately informed in such cases is great, even though not as great as in cases of rulemaking of general applicability. Consequently, until that time when the general definition of "rule" used in the APA is changed so that "rulemaking" of particular applicability is treated as adjudication, the procedural protections of section 553 should be made applicable to all subsection (a)(2) regulation formation. The various exemptions now contained in section 553 will adequately deal with any special problems that arise from application of that provision to such rulemaking of particular applicability.

VIII. CONCLUSION

Serious proposals for the elimination of the section 553(a)(2) exemptions for rulemaking relating to "public property, loans, grants, benefits, or contracts" have been made since at least 1955. The Task Force Report on Legal Services and Procedure of the Hoover Commission noted in that year that

> many rules governing proprietary matters, such as procedures respecting public property, loans [grants], benefits, and contracts, are of vital importance to the members of the public affected by them. Such rules often have a direct bearing upon private interests, and participation in the rulemaking process by those affected is appropriate and to be desired.[204]

The Task Force concluded that "proprietary functions may . . . be effectively executed by agencies with public participation in the rulemaking process" and, therefore, what is now section 553

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[204] TASK FORCE REPORT, *supra* note 6, at 158–59.

(a) (2) should be repealed.[205] It was convinced that "the requirement of public participation [in those cases] does not subject departments and agencies to an unreasonable procedural burden." [206] Since that time several bills have sought to accomplish the same result: elimination of section 553(a)(2) as it is presently constituted.

This study demonstrates that the 1955 Task Force Report of the Hoover Commission and the bills since introduced into Congress were correct. The unqualified exemptions from section 553 for all rulemaking relating to "public property, loans, grants, benefits, or contracts" should be repealed. The reasons advanced to justify those exemptions are not sufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rulemaking proceedings than is currently found in section 553(a)(2). The existing "impracticable, unnecessary, or contrary to the public interest" provision found in section 553(b)(B) and the "good cause" exemption found in section 553(d)(3) provide such an exclusion from the requirements of section 553(b)–(d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by section 553(e) seems no more necessary or justifiable for subsection (a) (2) rulemaking than for rulemaking already covered by section 553.

The solution proposed here to the difficulties arising from the repeal of section 553(a)(2) is bound to put some additional burden on the agencies who will have to implement it. But the burden involved in agency use of the section 553(b)(B) and section 553(d)(3) exemptions is not likely to be very large. Furthermore, any administrative burden that is in fact likely to result from the proposed solution would seem clearly outweighed by the benefits obtained. Repeal of section 553(a)(2) will, after all, guarantee increased public participation in rulemaking of the kinds currently excluded from usual procedures by that provision.

A discouraging discovery made in the course of this study has been that a number of agencies opposing modification of section 553(a)(2) do not seem to have restudied their position carefully and seriously during the last few years. Statements opposing repeal of these exemptions that were prepared as long as five, ten, or even thirteen years ago are still used by some agencies as the principal basis for articulating their current position on this subject. The language of a few such statements has sometimes not even been modified to reflect subsequent changes in the law, or obvious changes in circumstances, when they were reissued in light of a new inquiry on this subject. It is hoped that the present study can at the very least provoke those agencies who have opposed modification of section 553(a) (2) into conducting a serious and careful reconsideration of their position on the question. That reconsideration should result in this realization: repeal of the exemptions for rulemaking relating to "public property, loans, grants, benefits, or contracts" need not seriously disadvantage them in light of existing exemptions contained in other portions of section 553.

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[205] *Id.* 159.

[206] *Id.* 160.

In conclusion, it should be reiterated that the proposal made in this study would only affect the section 553(a)(2) exemptions for rulemaking relating to "public property, loans, grants, benefits, or contracts." The current proposal would not affect, in any way, the existing section 553(a)(1) exemption for rulemaking involving a "military or foreign affairs function," or the existing section 553(a)(2) exemption for rulemaking relating to "agency management or personnel." Similarly undisturbed would be the exemption from section 553(b)–(d) of all "interpretative rules" and "statements of policy" found in section 553(b)(A) and section 553(d)(2). The above exemptions, when combined with section 553(b)(B) and the "good cause" exemption found in section 553(d)(3), should provide fully adequate leeway for all agencies to meet their responsibilities properly, even after the repeal of section 553(a)(2).

RECOMMENDATION NO. 17

RECRUITMENT AND SELECTION OF HEARING EXAMINERS; CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND HEARING EXAMINERS; CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

RECOMMENDATION

A. Recruitment and Selection of Hearing Examiners

1. The Civil Service Commission should enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions by recognizing trial experience as one basis for qualification.

2. The Civil Service Commission should depart experimentally from the selective certification system as now practiced in the appointment of hearing examiners. Instead, it should develop a system under which the number of candidates qualified for hearing examiner positions is enlarged through the use of a general register for all agencies, with additional credit for specific relevant professional experience or selective certification for those agencies which demonstrate to the Civil Service Commission's satisfaction a current need for personnel possessing a specific background. The purpose of this experiment should be to permit meaningful comparative evaluation with the system now in effect. A report should be made to the Administrative Conference after 3 years of experience.

To aid the Civil Service Commission in effectuating the objective of this part of the recommendation, the Chairman of the Administrative Conference should appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any agency as being required for its work. Present selective certification agreements should continue until new standards have been adopted by the Civil Service Commission.

3. The Civil Service Commission should study and, if practicable, should institute an experimental intern program to supplement the direct appointment of hearing examiners from the register. Without finally deciding the issue, the Conference urges the Commission to consider anew whether successful interns should automatically be placed in hearing examiner positions.

4. The Veterans Preference Act should be amended to permit the selection of examiners for each vacancy from the top 10 available persons then appearing on the register, determined on the basis of examination and ranking without reference to veterans preference.

B. CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND EXAMINERS

1. Agencies employing attorneys and hearing examiners should encourage their participation in programs of continuing legal education. Budgets should include adequate funds for personnel so that attorneys and examiners may be released for reasonable periods of time to accomplish added training. Agencies should take all suitable steps to assure wide knowledge of training opportunities.

2. Agencies should also explore ways in which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

3. The feasibility of short-term exchange assignments of experienced attorneys in higher grades among agencies should be considered, in order to enhance the insight and effectiveness of government lawyers by exposing them to varied aspects of legal problems with which they may deal.

C. CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

1. A center should be established in the Washington area for the continuing legal education of Government lawyers, hearing examiners, and private attorneys practicing before Government agencies. The center should also promote coordinated programs within the Government and with specialized segments of the organized bar; stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education; and provide a mechanism for the exchange of information concerning professional problems of Government attorneys. The center, under the direction of lawyers, should be oriented toward applied legal problems. The Civil Service Commission should make available to it the benefit of the Commission's experience in establishing and operating Federal

Executive institutes and centers. The Federal Administrative Justice Center proposed by the American Bar Association in a resolution adopted by the American Bar Association's House of Delegates in January 1969, as an example, would serve the purpose of the present recommendation.

2. The establishment of the Center should not diminish each agency's present responsibility to provide continuing legal education for its own lawyers through "in-house" training programs, but the Center should support and assist all agencies in maintaining these programs at a high level of effectiveness.

VIEWS OF THE COUNCIL ON THE RECOMMENDATION OF THE COMMITTEE ON PERSONNEL

At its meeting on September 29, 1969, the Council of the Administrative Conference took the following action concerning proposed recommendations 1 through 4 of the Committee on Personnel concerning a change in the title for Hearing Examiners.

1. The Council objects to the name Administrative Chancellor as proposed in recommendation 2. The Council also objects to the name Administrative Trial Judge which has been proposed by the minority members of the Committee. If the name is to be changed, the Council feels that the name adopted should be one which does not have the disadvantages of the names proposed.

2. Since in its view an acceptable title has not yet been proposed, the Council does not express an opinion on proposed Recommendation 1.

3. If it is determined to change the name of Hearing Examiners to an acceptable title, the Council is in agreement with proposed recommendations 3 and 4.

Mr. Harold Russell, a member of the Council, wishes to be recorded as in favor of proposed recommendations 1, 3, and 4 and in favor of the name "Administrative Trial Judge" for the position now named "Hearing Examiner." *

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* The proposed recommendations 1 through 4 failed of adoption. Matters referred to in the attached Committee report as Recommendations 5 through 14, and which were adopted, are incorporated as subparagraphs of Recommendation No. 17.

REPORT OF THE COMMITTEE ON PERSONNEL IN SUPPORT OF RECOMMENDATION NO. 17

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INTRODUCTION

The Committee on Personnel has prepared recommendations for the Conference in four areas:

(1) a change of title for section 11 Hearing Examiners;

(2) changes in the examination and appointment procedures for Hearing Examiners;

(3) continuing legal education of Hearing Examiners and Government attorneys; and

(4) establishment of a center for continuing legal education.

These topics are not novel. The first three years have been subjected to extensive debate for a number of years and have been the subject of a variety of proposals, some of them running back to 1962 and the recommendations of President Kennedy's Administrative Conference, others to Hoover Commission recommendations, others to parallels in the Report of the Attorney General's Committee on Administrative Procedure in 1941, and beyond. The third topic raises proposals which have been tried in various forms in several departments and agencies and are offered to strengthen the potential value of these programs and to encourage their greater use throughout the Government. The idea of a center for continuing legal education of lawyers involved in the administrative process, which is embodied in the fourth proposal, has been the subject of extended study by the American Bar Association. The Committee recommendations are compatible with the detailed proposal of that organization.

With respect to all of these matters the Committee informed itself through five days of public hearings in April 1969, supplementary statements and exhibits, a survey of departments and agencies in June 1969 which invited responses to specific proposals, and numerous individual contacts with interested lawyers in and outside of Government.

The third and fourth sets of proposals, although subject to some debate as to specific details, were broadly supported and minimally controversial. The first and second sets, however, are very controversial. The bulk of the Committee's time and this report are devoted to these two topics.

A. Change of Title of Hearing Examiners

Recommendation 1

That the title of presiding officers appointed pursuant to § 11 of the Administrative Procedure Act (5 U.S.C. 3105) should be changed from Hearing Examiner to a title more clearly reflecting the unique status and responsibilities of these quasi-judicial officers.

Recommendation 2

That an appropriate title to accomplish the objectives of Recommendation 1 would be Administrative Chancellor.

Recommendation 3

That the Civil Service Commission effect this change of title.

Recommendation 4

That every department and agency employing such persons effect this change of title, as it is in the public interest that the same title be used throughout the Government.

Why Change the Title of Hearing Examiners?

The Committee was persuaded that support for a change of title to something more clearly reflecting the important position and function of these quasi-judicial officers was overwhelming. Testimony heard in the public hearings and received in written form was almost exclusively in favor of such a change. There was no comparable agreement upon a substitute.

The present title of Hearing Examiner is not readily understood by laymen. It does not suggest to lawyers not familiar with the agencies the significance given the findings and decisions of the presiding officer. It has been confused with and compromised by the extensive use of the title Examiner for a wide variety of inferior and clerical officers throughout the Federal and state Governments. Particularly in hearings such as those conducted by the National Labor Relations Board, where the credibility of witnesses and the full cooperation and respect of counsel and witnesses may be critical to the orderly and reliable conduct of the hearings, the title Hearing Examiner does not adequately suggest the serious character of the hearings. Attempts by agencies to individually dignify their hearings and to remedy this deficiency, by steps such as referring to hearing officers as Trial Examiners and referring to them in terms of the traditional courtesies and deferences of the courtroom, have not proven sufficient. Agencies, such as the Social Security Administration's Bureau of Hearings and Appeals, which deal directly with individual members of the public, report that parties do not feel the assurance and confidence they should from the appellate character of their hearing because they tend to regard the Hearing Examiner as merely another bureaucrat in their extended dispute with the agency. Attorneys who lack familiarity with the regulatory agencies also are confused and do not appreciate the independence of the Hearing Examiner. Further, since the title is ambiguous, Hearing Examiners often find it difficult to obtain the cooperation of Federal and state officials without lengthy explanations, as when obtaining the use of state courtrooms. And since the title is neither descriptive of function nor appropriate to the status of the office, it is suggested, potential applicants for Hearing Examiner appointments are not attracted to the office. A more appropriate title would, presumably, have a beneficial effect upon the morale, recruitment and retention of the entire corps of Examiners.

What Should the Title Be?

Although the need for a title change is almost consensual, the choice of the title to be substituted has produced a great deal of controversy. The title proposal receiving the strongest support has been "Administrative Trial Judge." It has been sponsored by the Federal Trial Examiners Conference and by the Administrative Law Section of the American Bar Association, has been the subject of legislation introduced by Senator John G. Tower of Texas, is apparently unanimously supported by the Hearing Examiners themselves, was the overwhelmingly favored proposal at the April public hearings of the Committee on Personnel, and has won the support or general acceptance of a number of agencies and departments, including the Federal Power Commission, the National Labor Relations Board, the Federal Maritime Commission, the Bureau of Hearings and Appeals of the Social Security Administration, the Department of Housing and Urban Development, the Small Business Administration, the Post Office Department, the Department of the Army, and the Federal Communications Commission.

Although some criticism of the term "trial" as non-descriptive of the function of Examiners in several agencies was received, the bulk of opposition was to the term "judge." It has been suggested that "judge" misdescribes the function of the Examiner and the hearing; that it will create confusion with members of the Federal Judiciary; that it suggests an independence of agency policy and of agency fact finding and decision powers that is quite inconsistent with the statutory objectives of the Congress; that it will induce unnecessary, undesirable and counterproductive judicialization in the hearing process; that it is not needed and is inappropriately honorific for the office of Hearing Examiner; that it would be incongruous with the reviewing functions of agency review boards and of the Boards and Commissions themselves; that it would suggest that the Examiner's decision has the status of a judicial determination; that to apply it across the board to all Section 11 Examiners would not recognize the considerable range in grade from GS–13 to GS–16 of Examiners, nor in the responsibilities and public significance of their respective functions; that the change is too drastic and that nothing indicates that the adoption of "judge" would accomplish the benefits claimed for it by the proponents; and that it may, especially when coupled with the word "trial," suggest an excessively adversarial character and mislead counsel and interfere with the efficient conduct of the proceedings. Agencies opposed to the use of "judge" in the title, or critical thereof, included the Atomic Energy Commission, the Civil Aeronautics Board, the Department of Commerce (including the Office of Foreign Direct Investments, the General Counsel, and the Maritime Administration), the Federal Trade Commission, the Interstate Commerce Commission, the Department of Health, Education and Welfare, the Department of Justice, the Department of Labor and the Department of the Treasury. The reader is reminded that these agencies, as well as those favoring "judge" above, have radically varying degrees of interest in the Examiner program and in the use of Examiners. A tally of proponents and opponents has no validity, but the scope of support and opposition has, and the agencies and departments are reported for that very limited purpose. A decision must be made upon the impact of the title change upon agency function, keeping in mind that some agencies are closer to the process than others and any decision in this regard will have a greater impact on them. Unfortunately, these do not divide decisively in one direction or the other.

It is tempting to think that there must be some compromise title upon which most interested parties can agree. There does not appear to be one. Numerous suggestions have been offered, including:

Adjudge
Adminijudge
Administrative Chancellor
Administrative Judge
Administrative Law Officer
Administrative Trial Judge
Administrative Trial Officer
Examiner
Federal Trial Examiner
Hearing Officer
Judicial Officer
Presiding Officer
United States Trial Examiner
United States Trial Officer

One of the reasons that compromises seem so unpromising is that the Examiners themselves and the agencies most strongly supporting them feel that the term "judge" is a critical element in any significant strengthening of the title, and that they further feel that a title change without the word "judge" will preclude further consideration of the matter for a number of years.

The Committee on Personnel proposes the title *Administrative Chancellor*, believing that it indicates to the unfamiliar layman or attorney the essentially formal character of the proceeding, the independence and high status of the hearing officer, the dignity and deference to be extended the office, and the necessary distinctions to be made between administrative rulemaking and adjudication on the one hand and Federal judicial proceedings on the other. The Committee feels that this title is as appropriate as any offered it to describe the varied functions of the full range of examiners appointed under Section 11, and that it will be as acceptable to as broad a base of agencies utilizing Examiners as any title suggested to the Committee.

Must the Title be Uniform as to All Agencies?

With the agencies divided, it has been suggested that each agency be left to determine for itself whether a change in title is needed and what title is most appropriate for its hearing officers. Arguing against this is the assumption that the uniform selection process, the sameness of status under Section 11 of the Administrative Procedure Act and the similarities of function would make such variations incongruous. Nevertheless, it is clear that some agencies feel a strong need for the change to "judge" and the question was carefully weighed before the general principle of the advantages of uniformity was adopted.

It has been suggested to the Committee that there is considerable variation in the functions of examiners. The far less formal hearings deciding claimants' rights by Social Security examiners are quite different from the complex economic proceeding of rate making at the Federal Power Commission and both differ significantly from the credibility determinations and fact finding responsibilities of the National Labor Relations Board examiner. All three differ in turn from the fitness determinations of an examiner for the Federal Communications Commission in a licensing renewal case. All of these differ from each other and from the work of examiners in other agencies but all share in broad general functions such as making evidentiary rulings, controlling the development of testimony, dealing with counsel, making initial determinations of law and fact, etc.

It has also been suggested to the Committee as noted above, since examiners range in grade from GS–13 to GS–16, that a single title as honorific as "judge" would bestow inappropriate formality and dignity upon proceedings that benefit from their informal character.

The differences in duties, role and rank outlined above were weighed against the advantages of uniformity before the Committee chose to make the title choice uniform.

Under the present law the agencies may adopt any title they choose for internal administration, public convenience, law enforcement and similar purposes. This conclusion is based upon an advisory letter sent the Federal Trial Examiner's Conference by the General Counsel of the U.S. Civil Service Commission on Feb. 5, 1969, which indicated that a uniform title established by the Civil Service Commission was necessary for purposes of personnel administration, and for budgetary and fiscal matters, but that agencies individually might characterize their examiners as they chose for the other purposes noted. In neither case would legislation be needed to accomplish the change.

In its June 16, 1969, survey inviting agency comment upon tentative proposals, the distinction made by the General Counsel of the U.S. Civil Service Commission was brought to the attention of agencies and departments. This was done to determine how important the uniformity principle was thought to be, and whether agencies might prefer to have individual initiative in the matter of the title change.

The following agencies indicated a preference for a uniform solution: Federal Maritime Commission, Federal Trade Commission, and Small Business Administration.

The following agencies supported the permissible change by individual agencies: Federal Power Commission and Housing and Urban Development.

The reasons given in opposition were (1) that a risk of confusion would be created by variations in the styling of examiners, and (2) that the variations would be a source of rivalry in status between agencies and would create pressure on the agencies not using the most desired title to adopt it, especially if that title were to include "judge." The virtues of uniformity were not explained beyond this. A limited variation was proposed by the consultant. This would be to adopt a common title for all examiners for budgetary and examination purposes. This would be accomplished by the Civil Service Commission. Then, agencies employing those in grade GS–16 would be permitted to experiment with "Administrative Trial Judge" or other titles and would thereby obtain a valuable experiential basis for evaluating, broadening or abandoning the reform. Part of the survey response of the I.C.C. was especially relevant to this proposal:

> We would also like to point out that there is a great difference in the work of hearing examiners in different agencies. Also, the necessary degree of legal and administrative knowledge and training is so varying in different agencies that we do not believe a "broad brush" grant of the title of Judge should be so generally applied, indicating equal Judge status, to all the hundreds of hearing examiners who would be included. We have heard no sound rebuttal of this point. It appears, therefore, that the major, and perhaps the only, reason for asking for the change of title to Judge, for *all* hearing examiners, regardless of the great range of difference in the size, importance, and type of cases and procedures handled within the full list of agencies affected, is to gain the broadest possible support—a strength in numbers, united front approach, so to speak.
>
> Additionally, the ICC does not believe the ICC Commissioners should be asked to take a position regarding the titles of staff personnel of other governmental units; nor should members of other such units be asked to vote on title designations for the ICC staff.

Thus, the consultant's proposal was one of uniform title for Civil Service Commission purposes and of an "individual agency option" on selection of title for GS–16 Examiners as an experiment to determine the advantages of title changes. The proposal was rejected by the Committee, because it would permit the use of the title "judge" when this was thought inappropriate and because it would introduce the possibility of a variety of titles confusing to the bar and public, stimulating rivalry among agencies in bidding for Examiner favor.

The use of various titles by individual agencies, or two titles among all agencies, would not appear to interfere with the use of a single title for examination and personnel purposes by the U.S. Civil Service Commission. The Commission did not respond to this item of the survey, but the General Counsel's letter noted above does not suggest that an agency by agency change would interfere with the Commission's responsibilities. Since the enactment of the Act, agencies have used various titles, e.g., Trial Examiners at the NLRB; Examiners of Inheritance in the Department of Interior; and, earlier, Referees in the Social Security Administration. The letter did question the feasibility of accomplishing a comprehensive change on an agency by agency basis.

The Committee adopted the recommendation that every department and agency effect the change of title, as it is presumed to be in the public interest that the same title be used throughout the Government. Although the law will still permit agencies to adopt individual titles for the limited purposes noted above, the thrust of the recommendation will be to prevent such experimentation by individual agencies. This fourth recommendation is thus separable from the first three and is designed solely to assure uniformity in the styling of examiners. It is not essential to the accomplishment of the title change, as such, but is the recommendation of the Committee as a policy matter.

Will the Title Change Affect Examiner Subordination?

Some agencies expressed concern lest the title change subtly affect the relationship of the Boards and Commissions or executive officers of departments and the subordinate examiners. This was clearly not the intention of those proposing the title change. In its June 16, 1969, survey, a Committee proposal dealt with this matter explicitly:

> That this change should be accomplished in such manner that it will not affect the concept of examiner independence, the subordination of examiners to agency powers as provided in 5 U.S.C. 557(b), and the duty of examiners to comply with reasonable and proper directions of their respective departments or agencies in matters of administration.

After considering the responses and the law, it was the feeling of the Committee that this was very clearly the case and that neither the procedure proposed for accomplishing the change of title nor the change of title itself could modify these relationships. Hence, the Committee chose to drop this recommendation altogether.

Are Future Title Changes Barred?

The Committee repeatedly heard the argument from those favoring "judge" that the adoption of any substitute would effectively bar consideration of that title for a number of years. This is not the Committee's intention. The Committee, reacting to the clear division of opinion among agencies as to the suitability of the title "judge" chose what it regards as an equally honorific title, and one to which such strong adverse reaction was not received. It recognizes, however, that in practice the advantages claimed for a title change may not be realized and that experience with Administrative Chancellor may eventually lead to a renewal of the debate. The Committee notes this in simple candor. It does not seek to prejudice the consideration of any proposal based upon additional experience and reflection in the future.

How Will Administrative Chancellor Be Received?

In its survey of June 16, 1969, Administrative Chancellor was one of three titles offered agencies to replace the present title of Hearing Examiner.

It was criticized by three agencies as being susceptible of confusion with the officers of the Judicial branch and by one as misleading as to function, leading to confusion with religious or educational institutions or with courts of probate or equity. It was supported explicitly by only one, although several others indicated that it would be acceptable to them.

The debate as to title change has been so thoroughly polarized by the proposal of "judge" that it is difficult to predict with confidence the reception Administrative Chancellor will have. Its historical associations with the system of justice of English speaking peoples, its strong associations with high station, responsibilities and independence in all contexts, and its specific tie to the regulatory process through the addition of "administrative" would seem to make it an attractive replacement for Hearing Examiner.

B. RECRUITMENT AND SELECTION OF EXAMINERS

Recommendation 5

That the Civil Service Commission enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions through recognition of trial experience as one basis for qualification.

Recommendation 6

That the Civil Service Commission on an experimental basis amend the selective certification system as now practiced in the appointment of hearing examiners and provide in lieu thereof a system whereby the number of qualified candidates for appointment to hearing examiner positions would be enlarged through the use of a general register for departments and agencies generally, with the proviso for additional credit for specific relevant professional experience or selective certification for departments and agencies which justify a need on a current basis for such specific relevant professional experience to the Civil Service Commission in order to permit a meaningful comparative evaluation of the system currently in effect, a report to be made to the Administrative Conference after three years of experience.

Recommendation 7

That to effectuate the objectives of Recommendation 6 the chairman of the Administrative Conference appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any department or agency as justifying experience, the present selective certification agreements to serve until the new standards are adopted by the Civil Service Commission.

Recommendation 8

That an intern program on an experimental basis to supplement the direct appointment of examiners is recommended to the Civil Service Commission for immediate study and for adoption if practicable in the judgement of the Commission.

Recommendation 9

That the Veterans Preference Act be amended to permit the selection of examiners for each vacancy from the top ten available persons appearing on the register, preserving examination grades and ranking to facilitate selection and eliminating Veterans Preference Points (5 to 10).

Why Consider the Selection Procedure?

For a number of years an extensive debate has raged among those most interested in the examiner program as to whether the recruitment and selection procedures were producing the optimum quantity and quality of candidates and appointees. Numerous issues have been raised in this debate, such as whether sufficient publicity has been given nationwide to the number of positions, to the perquisites of examiners and to the examination procedures; the impact upon potential attorney-applicants of the administrative law requirements; the reliance upon confidential inquiries of associates of applicants with inescapably varying subjective factors of scoring; the burdensome character and extent of materials and information required of the candidate for examination purposes; the allegedly partisan role of some members of the personal interview panels; and the difficulties associated with obtaining a reevaluation and reranking once the examination has been passed successfully. All of these questions, however, have lacked the degree of controversy attached to the two general questions of most far-reaching significance in the GS–16 examiner program:

(1) Should expertise be a prerequisite to appointment as an examiner; and

(2) What freedom should the agency have in selecting examiners.

Both questions relate to the potential costs or efficiencies of regulatory programs.

Under the present system, agencies assure the appointment of specialist attorneys already familiar with the substantive issues of the agency by obtaining from the Civil Service Commission a "selective certificate" whenever an Examiner vacancy occurs. The candidates on the "selective certificate" are taken in order from the general register, regardless of their place on that register, on the basis of their prior qualifying experience in the appropriate area of specialization. On the "selective certificate" they appear in the order in which they appeared on the general register, but when there are only a few candidates with the specialized experience they may move from near the bottom of the general register to the very top of the "selection certificate." A concrete illustration is provided later in this report.

Selective certificates are not provided agencies merely for the asking. An agency must first justify to the Civil Service Commission that its work is of such a specialized and technical character that a limiting experimental prerequisite is necessary for the effective conduct of its business. Such requirements are made public by the U.S. Civil Service Commission in the examination announcement. The following language and examples from Announcement No. 318 are provided to illustrate:

Special Qualifications for Filling Certain Hearing Examiner Positions

In filling Hearing Examiner positions in certain Federal regulatory bodies, prior consideration is given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before these bodies. . . .

. . . Listed below are the special qualifications for the positions in these bodies.

In order to obtain prior consideration in filling a position in one of these bodies, an eligible applicant must have clearly established in his application and related papers, in the manner prescribed in the examination announcement, that he has acquired the special qualifications for that position within the 7 years immediately preceding the date of his application.

When it is found that the register does not contain the names of a sufficient number of eligibles possessing the special qualifications for consideration by an agency, certification will then be made in regular order from the register.

FEDERAL POWER COMMISSION

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, involving causes arising in the field of public utilities law. These cases must have originated before governmental regulatory bodies at the Federal, State, or local level.

INTERSTATE COMMERCE COMMISSION

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory agencies at the Federal, State, or local level, in the field of surface transportation (including transportation by rail, motor carrier, or water), involving matters relating to rates, finance, operating authorities, and safety. In the absence of a sufficient number of eligible applicants with the foregoing experience, priority in certification will next be given to those with similar experience in the field of air transportation.

NATIONAL LABOR RELATIONS BOARD

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal or State level, arising in the field of labor law and involving the enforcement of governmental policy encouraging collective bargaining and the right of free association in connection with employer-employee relations.

An applicant who has fully established his general eligibility under the terms of the examination announcement is permitted to submit evidence of his participation, within the 7 years immediately preceding the date of his application, in the arbitration of labor disputes in connection with the provisions of a collective bargaining contract or statutory machinery, as partial or complete satisfaction of the special qualifications requirement set forth above.

What Has Been the Effect of Selective Certification?

There is no question but that the effect of selective certificates has had the primary effect of providing the agencies with examiners with the necessary specilization. The secondary effect, however, has been to reduce, in the original instance, the field of potential appointees to GS–16 Examiner positions to a small population of specialized lawyers. Although private attorneys are members of this population, they have shown little interest in Examiner appointments. The secondary effect, then, has been to staff these specialized agencies predominantly with Government lawyers formerly on the staff of the appointing agency. This has been widely criticized as "cronyism," as promoting 'inbreeding," and as unfair to the attorneys on the general register, many of whom scored substantially higher on the qualifying examination.

In the most general terms, the supporters of selective certification have argued as follows: (1) the cost of training in specialized areas of legal practice is substantial and should not have to be borne by the agencies when qualified personnel are available; (2) the delays resulting from having to train generalist lawyers in technical or specialized areas are significant, impose a requirement for redundancy of personnel when such professionals are in short supply, and lengthen the delays in case adjudication and disposition when examiner staffs are shorthanded; (3) selective certification assures the appointment of lawyers who will like the work of the agency, since generalist lawyers frequently find the specialized practice of the agencies much less to their liking than they had anticipated in the abstract; and (4) it facilitates the execution of the specialized tasks for which the agencies were created. The suggestion that selective certification has resulted in staleness and inbreeding has been explicitly denied.

Still, there is no question but that selective certification has often had the effect on the register of elevating for consideration individuals whose scores placed them far down on the general register of successful examinees. This, the critics argue, proves that selective certification by-passes the merit system and unjustly permits inferior attorneys to be appointed. This argument does not automatically follow, however. For one thing, the register itself is composed of mature professional men who may not be so differentiated in skills and ability as the raw number comparisons would suggest. For another, the Veterans Preference Points may elevate a man from 83 to 93, but this does not suggest that he is professionally superior to someone on the register at 84 or 85 without Preference Points, or even at 80 or 81 without Preference Points, since a discrimination of two or three points on a highly subjective evaluation of professional men in mid-career may be a treacherously difficult and unreliable discrimination. Further, the weighting of points on the examination clearly prefers the older professional with more than minimum time in qualifying grades. This is not an irrational weighting, but it suggests that the younger ICC lawyer, for example, who goes on the register as soon as he is minimally qualified may not be a bad choice for the agency when compared with a generalist ten years his senior. The ICC may obtain, as an added benefit of selective certification, his additional ten years in office as an examiner.

Nevertheless, it is clear that selective certification provides agencies with previously experienced specialists *and* disrupts the merit ranking of the general register. Thus, in responding to the notice of the April hearings by the Committee on Personnel, the U.S. Civil Service Commission pointed out that a comparison of standings of individuals on the general register with their standings on a selective certificate provided one of the agencies employing GS–16 examiners in 1967 showed the following variations:

Standing on the General Register	*Standing on the Selective Certificate*
5th	1st
31st	6th
40th	7th
42nd	8th
51st	10th
60th	11th

But what does this mean? Does it mean that the requesting agency, if it picks up the 11th man on its selective certificate, has by-passed over fifty attorneys of superior professional qualifications? Apart from the subjective variations in testing and scoring, it does mean that. But we must ask, so what? The absolutely critical question is not whether there may be superior generalist attorneys available, but whether there is anyone else available who is superior in general professional qualifications and *who has the absolutely essential specialized knowledge.* If, as this agency has said, it must have persons of specialized experience, then one not so specialized cannot perform the job the agency requires in a reasonable time and reliable way. No matter how superior he may be in other respects, he cannot perform the job the agency requires.

This leads us to two important conclusions: (1) the primary question is not the effect of selective certification on the register, but whether it is necessary to the agency; and (2) the impact upon the by-passed generalist is a secondary effect of selective certification.

Thus, a solution to the dilemma of selective certification, should superior attorneys be by-passed in favor of those with superior specialization and experience, must rationally be solved by determining whether selective certification can be justified. It cannot rationally be solved by adopting any scheme merely designed to put the superior generalist professional in a better competitive position with the specialist.

Statistics are often cited to show the evil impact of selective certification in terms of staff appointees as examiners. This bypasses the fundamental question, *was such specialized experience essential?* The need felt by the specialized agencies was succinctly put by the Office of the Judge Advocate General of the Department of the Army in responding to the June 16, 1969, survey:

> With regard to proposal B (Examiner selection), we feel that the standards for the selection of examiners should not be reduced or relaxed in any respect. Nothing can frustrate the regulating scheme, that is, the orderly, expeditious, and just disposition of important matters and proceedings, like an examiner who is not well versed in trial practice and procedure, or one who lacks a sound knowledge of utility rate-making principles and practices, tariff structures, and utility rates and charges or one who lacks a judicial temperament. The current requirement for extensive administrative law experience and the manner of establishing this experience should be continued.

If it *is* essential, the high incidence of appointments of former staff members reflects only the very limited pool of such specialized experience that is available and the fact that the private bar possessing parallel experience is not attracted to the examiner positions. The Civil Service Commission has had enormous difficulty in attracting private attorneys with administrative law experience, much less specialized agency experience, to take the exam. And the agencies have repeatedly indicated their willingness and desire to take private attorneys with specialized experience when such men become available on the register.

Finally, it should be noted again that the private bar that is highly qualified and would readily meet the selective certification requirements has historically shown little interest in applying. It has been suggested that this is because: (1) examiner's pay, though quite respectable, is not competitive with the income of specialized private practitioners; (2) examiners lack the status and prestige that would attract such attorneys; (3) examiners lack independence of final judgment because of agency review of decisions; and (4) examiners must work for the Government and many of these attorneys cannot conceive of themselves as Government employees.

Thus, we must ask, does it matter that since 1964 that of 66 appointments to agencies utilizing GS–16 examiners and requiring specialized experience that 52 had been employed on the staffs of the agencies ultimately appointing them? Where else will the agencies get such experience? A partial answer to this lies in training programs, and in specialized recruitment programs, such as the experimental intern program recommended by the Committee on Personnel and discussed later in this report. But as to the critical question, is such specialized experience necessary, the Committee on Personnel proposes an inquiry directly into that issue.

What Are the Agency Attitudes Toward Selective Certification?

The responses tended to focus upon two problems, (1) how much specialized knowledge or expertise is needed to serve effectively as a hearing examiner, and (2) whether this specialized knowledge should be a prerequisite to appointment as an examiner. The very controversial question of whether selective certification should be permitted is an outgrowth of both of these, since the use of selective certification implies that expertise is a critical factor in examiner selection for agencies utilizing selective certification, and since it gives an absolute preference to applicants with such experience over those without it, no matter how superior the latter may be in general professional qualifications.

Considerable concern has been expressed, especially by representatives of the American Bar Association, about the disproportionate number of agency lawyers appointed as examiners in the agencies in which they have been serving. This, it is argued, leads to in-breeding and staleness in agency decision making.

The American Bar Association has strongly urged the abolition of selective certification, and supports, in lieu thereof, an intern program and on the job training where necessary to satisfy agency specialization needs. This assumes that such expertise or specialized knowledge as the examiners require may be acquired on the job or in specialized training programs after their initial appointment, and that it can be acquired in a reasonable time.

Although the responses were not always specific or unequivocal, the following agencies tended to support the American Bar Association in its position: Health, Education and Welfare, Housing and Urban Development, and the Small Business Administration.

Agencies tending to support selective certification or other methods designed to assure specialized competence prior to appointments included: Atomic Energy Commission, Civil Aeronautics Board, Department of the Army, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission (although FPC would give up selective certification if the Veterans Preference Act were amended to permit a sufficiently broad selection from the general register—a proposal to be discussed below), Federal Trade Commission, Interstate Commerce Commission, Labor, Post Office and the National Labor Relations Board.

The Committee was told that the costs of training the new examiner and the consequential delays in processing cases would be enormous. The estimate of two years training before an examiner without prior specialization could be fully effective was given by several agencies. Whether that is a reasoned estimate or an approximation based upon their two-year specialization requirement for the examination, could not be determined without a detailed inquiry into the substantive work of each agency. The National Labor Relations Board estimates that four years of training would be required for its purposes.

It should be noted, however, that although the examination requirement for selective certification is only two years, the practical effect of that requirement is to provide the agencies with much more extensive experience. The typical applicant qualifying for selective certification actually has seven or eight years of specialized experience. Oddly, it may be that with a two-year qualification requirement the agencies have been obtaining the seven or eight years that they may really need. An investigation of their justifications might suggest to the Civil Service Commission that a more realistic prerequisite for any given agency might be seven or eight years, instead of two. This would have an additional advantage in that it would clearly indicate to those on the general register that the needs of that agency are so specialized that it would be most unlikely that the agency would ever go to the general register, rather than waiting for additional specialists to qualify.

Some measure of how important to their own operations agencies regard the prerequisite specialization is reflected in agency tactics when they cannot obtain an acceptable candidate from the list provided. Often the agencies will then go to other departments or agencies and solicit the transfer of specific examiners with related skills or particularly attractive professional reputations, or they will simply wait until they can qualify some of their own attorneys through selective certification. Such tactics have been attacked as demonstrating the bad faith of the agencies, but they may more fairly be characterized as reflecting the great importance to the agency of an effective, reliable examiner corps. The agencies, with enormous amounts of business to conduct, have little incentive for the appointment of bad performers.

It is somewhat paradoxical, some agencies feel, that their use of specialization has been under such hostile attack by the American Bar Association in a period in American legal history when specialization in the private bar has become increasingly an inescapable and accepted fact.

The increasing emphasis by Federal courts in judicial review of agency action upon the need for broad agency evaluation of planning and promotional impacts of regulation will result in increased pressure upon the agencies to utilize examiners broadly sophisticated in the impacts of substantive regulation. An examiner can scarcely evaluate the significance of holdings upon the public interest and upon industry growth and development or upon competitive aspects of industry performance if he is not profoundly aware of the role of regulation, its scope and implications. This is especially critical in agencies in which there is little representation of the interest of the general public by staff counsel or by other governmental agencies. In such situations the examiner must make certain that the developing record contains the information critical to an informed agency decision, or delays and remands from the Federal courts may follow and disrupt the regulatory scheme. How is the examiner to know whether a reliable record is being developed if he is totally dependent upon the adversarial presentations of attorneys before him, especially when all interested parties and the interests of consumers and the general public may not be represented.

For effective regulation, it is not only important that the examiner be knowledgeable, but that he be sufficiently competent in the substantive problems of the agency to evaluate the performance and arguments of counsel. The role of the passive generalist judge is simply not analogous to many of the presiding and decision making problems faced by the examiner. Thus, there is a clear necessity for a careful substantive evaluation of agency needs for selective certification before it is abandoned. Neither should it be continued indefinitely without such impartial review as has been proposed by the Committee.

A further justification for selective certification is the very high number of examiners already eligible and soon to become eligible for retirement. This potential erosion of the examiner corps is relevant not only to the need for appointing men qualified to assume a full workload, but is also relevant to the need for establishing an effective intern or training program. If such training can be realistically coupled with examiner appointments, the short supply of already qualified attorneys may be considerably enlarged.

What Solutions Were Considered for Selection Certification and Recruitment?

Six major possibilities for examiner selection procedures were considered. Four of these may be fairly characterized as follows, moving from the procedure least emphasizing prior expertise to that most emphasizing prior expertise:

(a) The exclusive use of a general register with such specialized training as may be needed to qualify the attorney to be administered after appointment. This is essentially the position advocated by the American Bar Association.

(b) The appointment of lawyers seeking examiner positions to interim attorney positions to permit them to acquire experience in specialized areas prior to selection as examiners. This procedure received no support and was generally attacked as impracticable because of the difficulty of inducing mid-career attorneys to leave an established career for an interim appointment of uncertain future.

(c) The use of a general register for non-specialized agencies and individual special registers for each agency with a distinct expertise requirement that is able to justify the establishment of such a register to the U.S. Civil Service Commission. The advantage of this procedure is that it permits weight to be given to prior specialized experience but does not require that such experience be completely determinative, e.g., a lawyer with outstanding professional qualifications but no specialization would not be immediately and irretrievably ranked below lawyers with an inferior professional record who happened to have the required two years of specialization.

(d) The use of a general register with selective certification afforded agencies justifying their need for such restrictions. This is the present method and was given strong criticism and strong support.

Two other proposals were considered with these, for they are closely related in effect. The fifth proposal was similar to the procedure discussed under c. above, except that agencies with similar requirements would have been lumped together for examination purposes, e.g., transportation agencies, public utility agencies, labor law, etc. And a sixth represented an attempt to provide an alternative to selective certification or special registers by requiring of all examiners a general knowledge of contemporary economic regulation. This proposal received no significant support and was attacked as requiring too detailed a knowledge of economics and business regulation.

The suggestion of specialized examinations was generally favorably received by those supporting selective certification, with the caveat that performance on an examination should not be regarded as equivalent to experience and that some weighting between the two would be necessary. Obviously, those opposed to selective certification tended to be opposed to the specialized examination proposal as well.

The question as to the feasibility of specialized examinations or special registers must ultimately be a decision of the Civil Service Commission for it is inextricably bound up in the requirements of the examination process. The consultant's preliminary recommendation was that these be suggested to the Commission for study by its Advisory Committee, along with the question of whether or not the selective certification requirement should be lengthened. Both special examinations and lengthening the selective certification prerequisite have the effect of intensifying specialization and of further isolating the examiner appointments from the unspecialized bar. The special register proposal, in contrast, permitted a weight to be assigned specialized experience but did not entirely eliminate the outstanding generalist attorney. Thus, an agency attorney with seven years transport experience might have received seven points for such experience but be outranked by the superior generalist attorney whose overall score was higher though he lacked transport experience altogether. The Committee recommendation of permitting limited additional credit for specialized experience is essentially the proposal for specialized registers without special examinations. It is explained further below.

It might be noted that a similar effect to weighting expertise would be indirectly obtained should the Veterans Preference Act requirement of the "Rule of Three" be eliminated. This requirement ties the agency selection inescapably to the top of the register. If either the zone of consideration were enlarged to 15 persons, as suggested by the Federal Power Commission, or if an unranked register were offered the agencies, then the most talented candidates could be chosen, whether their merit lay in superior specialized experience or in overall superiority as generalist attorneys. The Committee-proposed enlargement to a "Rule of Ten" preserves aspects of the merit system and still enlarges agency discretion.

Another means by which a larger number of persons might be added to the generalist register would be through a redefinition of what constitutes "administrative law experience," e.g., by recognizing trial experience as a means of qualification. A limited broadening of that definition by the Civil Service Commission might enlarge considerably the number of persons qualifying for the general register. This would not change the problem as to the majority of GS–16 appointments, however, since the controlling factor in those cases is the selective certification requirement, a requirement less susceptible of liberal definition and the redefinition of which would defeat the very purposes for which the agencies have adopted it.

It should be noted that the U.S. Civil Service Commission, the individual agencies and the American Bar Association and other professional organizations have all cooperated in an intensive program of promotion of the hearing examiner applications. Such recruitment cannot, however, have more than limited effect on the GS–16 appointments without the adoption of an intern program or some other training mechanism, unless the selective certification requirement is eliminated.

What Does the Committee Recommend Relative to Recruitment and Selective Certification?

The Committee proposes that the Civil Service Commission, if recommended after study, substitute for the present selective certification system the use of a general register with credit for specialized experience to be given candidates whenever agencies considering them for appointment have justified to the Conference Committee and to the Commission a current need for such specific relevant professional experience. This would be supported by the review of such justifications by a special committee appointed by the Chairman of the Administrative Conference of the United States, whenever changes in such justifications are proposed, with the present selective certification procedure operating as that standard until new standards of specific relevant professional experience are approved by the Committee and adopted by the Civil Service Commission. The Civil Service Commission will immediately ask each agency utilizing selective certification to justify its reliance upon such standards and will then ask the Special Committee of the Administrative Conference to review such standards.

The Committee then would make a careful substantive analysis of the justification of the agency for selective appointments and would recommend to the Civil Service Commission at the earliest possible date one of three findings: (1) that the agency had not justified such specialized need as to avoid the general register; (2) that the agency had justified a need for specialization sufficient to give weight to the specific relevant professional experience of attorneys on the general register, such weight to be in the form of points for such experience and to have effect on their place on the general register for such agency or agencies only; and (3) that the agency has justified such a critical need for specialization in its appointees as to permit it to continue to use selective certification or to be given such weight in bonus points on the general register as to make such specialization determinative in normal cases.

The added effect to the present system of this proposal would be as follows, illustrating the point bonus system for specialized experience. Applicant X is placed on the general register with a score of 84. If the Federal Power Commission requested a certificate to fill a vacancy, since X has four years of utility experience, his score of 84 would be increased by points derived from that experience, say four points for illustrative purposes. For the purposes of the Federal Power Commission his grade would then be an 88 and if that placed him high enough on the general register, his name would be submitted to them. Suppose, further, that the Civil Aeronautics Board simultaneously asks for a certificate. For their purposes applicant X, lacking aviation law experience, stands wherever his 84 places him.

Such a system permits the superior generalist attorney to earn a higher score than the mediocre specialist. But it permits the agency to benefit at least slightly from the specialization of an attorney, if such specialization moves him above those attorneys without specialization but with somewhat superior general professional achievement and skills. The extent to which the agency would benefit from the applicant's prior specialization would depend upon the weight recommended for such prior specialization by the Special Committee and adopted by the Commission.

The system proposed by the Committee on Personnel would ultimately provide agencies with the best available talent. When specialization is critical, the system will provide specialists, if available. When prior specialization is central but not critical to agency performance, the system will provide the very superior generalist attorney or the specialist, depending upon which person earns the higher score on the specialty-weighted scoring procedure. And when specialization is not central to the agency's functions, the system will provide the highest scoring attorney without regard to specialization. Such a system would seem to permit a rational balancing of the advantages of generalist attorney talent and experience with the advantages of specialization. And it would provide for this balancing on an agency by agency basis. It does not impose upon any agency the needs or preferences of agencies engaged in substantially different regulatory tasks.

The significance of this proposal should not be misunderstood. Selective certification is regarded by several major regulatory agencies as absolutely critical to their appointment of effective examiners. For any given agency, this proposal may replace the present selective certification scheme, whereby specialization is an effective prerequisite to appointment from the register, with a bonus point system whereby applicants are merely given points for specialized experience. This would probably result in a bonus point formula, such as one point per year of specialized experience up to a maximum standard set by the Civil Service Commission. However, the proposal, as it stands, does not terminate the prerequisite effect of selective certification but makes such termination depend upon the findings of a special committee and the Civil Service Commission that such specialization in appointees is not critical to the work of the agency.

It should be noted, too, that the recommendations include one which requests the Civil Service Commission to permit the substitution of trial experience for administrative law experience in order to qualify for appointment to the general register. There is no question but that this would increase enormously the numbers of lawyers from across the Nation who could qualify for appointment to the general register. Such a change, alone, would have little impact upon the GS–16 register, since such candidates would still lack the specialized experience required by the agencies hiring the vast predominance of GS–16 examiners. When coupled, however, with a change in selective certification the impact upon the GS–16 register might be extremely significant! It is conceivable that the successful recruitment of highly successful private trial attorneys might place large numbers of candidates near the top of the general register who would be almost totally unfamiliar with utility law, aviation law, transportation law, ratemaking, licensing procedures, or any other aspect of administrative law.

Although the proposed substitution of trial experience for administrative law experience has been a standing proposal of the American Bar Association for some time and has been generally discussed among practitioners and agencies, it was not a matter raised by the public notice for the April hearings of the Committee nor raised specifically in the June 16, 1969, survey of agencies. The Committee has received only quite limited comment on this proposal and almost none from those agencies most likely to be affected. The principal argument in favor of permitting trial experience to be substituted for administrative law experience is that trial attorneys are thoroughly familiar with the adversarial format, with the rules of evidence, with the problems affecting control of counsel and parties, with the development of testimony and control of cross-examination, with the making of objections, and with all other facets of the trial processes which parallel the administrative hearing.

What Is the Effect of the Veterans Preference Act?

The preference points awarded by the Veterans Preference Act of five points to all veterans and ten points to all disabled veterans distorts the merit system of examiner appointments. The requirement of that Act that selection be made from the top three available candidates on the register (or special certificate) narrowly constricts the choice of Chief Examiners and Boards and Commissions appointing examiners.

To illustrate the pernicious effect as to the rational ranking of candidates which these preference points inject into the system, the following testimony from Valentine B. Deale, Esq., a private practitioner in Washington, D.C., and a member of the Advisory Committee on Hearing Examiners to the Civil Service Commission is offered:

> . . . I am talking now about the GS-16 register alone, and I am talking about that register as of March 10, 1969, so this is current information.
>
> There are 104 names on that register. Of this number, 15 have received ten preference points; 51 have received five preference points; and 38 are no-pointers. All the points they have (the no-pointers) are earned points.
>
> Because of the age of the folks on this register, I would suggest that it is likely that the veteran points are based or derived from service in World War II or Korea.
>
> At the bottom of the register there are just six who received the minimum passing grade of 80, but there are 18 five-point veterans with 85, and there are 6 ten-point veterans with 90.
>
> Now on an earned point basis, these additional 24 belong at the bottom of the list, so that we really have—on an earned point basis—30 people on the list with 80, but now, thanks to the unearned point additions, the ten pointers who would be at the bottom of the list are actually on the current list with rank (positions) of 25th to 30th, and the five pointers who would be on the bottom of the list are ranked 65th to 85th.
>
> Now, let's go to the top of the register. After a moment's reflection I am sure it doesn't come as any great surprise that the top five people on the register are ten pointers. Of the first 24 on the register, that is those with scores of 91 or above, and of those 24, 9 are ten pointers, 9 are five pointers and 6 earned their points all the way.
>
> Now, on the basis of earned points, the first on the register would be 5 non-veterans, and, incidentally, this touches upon the subject we will be talking about a little bit later, 4 of these 5 have selective certification qualifications, and as the register now stands, that is the first 5 at the top of the register have certification registration.
>
> I have this other point just for the edification of the fact that this business has other ramifications. On an earned point basis there is a spread of only 16 points, 80 to 96, and we are putting 104 people into that spread, and in that small spread, 15 are given a ten-point edge in a 16-point spread, and 51 are given a five-point edge.
>
> Now we go to, it seems to me, a further imposition of an improper requirement on the register system. First is the allocation of points; and the second, as I say, is the grading requirement. And my proposition is that it is unrealistic, artificial, to grade candidates on a narrow arithmetical basis when the critical parts of the tests are composites of the subjective judgments.
>
> Refined distinctions simply cannot be made in terms of measuring realistically the candidates' qualifications for different jobs. The plain fact is that a person might be better qualified for one job than another.
>
> Now in making that observation I suggest to you that there should be no trouble in (drawing a) line between a qualified person and an unqualified person, or between an outstanding person and a qualified person, or between a qualified and well-qualified person, but indeed we are fooling ourselves when we try to make distinctions among individuals with 81

> and 82 or 94 and 95. And the whole matter, the distortion, becomes compounded when we add these gift additions of the veterans' preference to the score. The grading system indeed confuses the process by giving a pretext of certitude which just doesn't exist.
>
> So it is sheer nonsense that the people who come out of this lottery, who happen to be at the top, are the best qualified for any agency who happens to need a hearing examiner at that time. So let me suggest that the underlying fact here is the derogation of judgment. We are talking about top people in an agency, and those top people are selected by the senior people of the agency, the commissioners, by the senior people . . . and those people, by the very nature of their positions have talent and that is why they are there. They have top talent.
>
> And what we are doing is (saying to them) that you can't choose your top people, the super-grades that play a critical role in carrying out the responsibility of your agency, a responsibility which the general manager shoulders. The derogation of (their) judgment here is the whole thing.
>
> We try to secure against their making their best judgments, you see, in terms of regulations and pretenses of arithmetical certitude.

This long quote from the testimony of Mr. Deale succinctly describes the impact of the bonus points in practical terms. It also points directly to the second aspect of the Veterans Preference Act which seems counterproductive in terms of the regulatory agencies, the Rule of Three. The Act presently requires the Civil Service Commission to certify to the agencies for consideration individuals ranked at the top of the register. The agencies must choose from the top three available candidates. This is a very severe limitation and leads to selective certification, waiting strategies in which agencies postpone appointments until individuals they do not want are appointed to other agencies, pirating of examiners from other agencies to avoid having to go to the general or selectively certified register, and strong attacks upon the examination process itself, with its inescapable rankings and scoring of highly subjective qualifications.

In the Committee's June survey, agencies were offered several possible modifications of the Veterans Preference Act: (1) selection by agencies from all candidates passing the examination, but with grades reported to facilitate Examiner selection; (2) enlargement of the Rule of Three to a Rule of Fifteen to broaden the discretion allowed agencies and Chief Examiners; and (3) a pass/fail register without grades or ranking, permitting agencies and Chief Examiners to choose anyone on the register.

The first proposal would have given agencies the complete register from which to choose. The grades to be reported to the agency merely for information.

The second proposal would give the agencies a list of names and the agency would be free to choose anyone from the top ten available.

The third proposal, like the first, would have given the agencies a free choice from the entire register, but no grades or scores would be reported.

Five agencies reported support of (1), seven of (2), and four of (3). Explicit opposition to these was voiced in several instances, but opposition tended to take the form of a suggestion that Congress cannot be persuaded to amend the Veterans Preference Act to exempt one class of positions from the competitive service. While this may be true, the responsibility of the U.S. Administrative Conference and the Personnel Committee is not to eliminate needed proposals simply because they are unlikely to prove immediately acceptable to Congress. If a modification in the Veterans Preference Act would strengthen the administrative process, it is the duty of the Conference to so advise the Congress and the Executive Branch.

Some agencies opposed modification of the Veterans Preference Act. These were: Federal Maritime Commission, Commissioner MacIntyre of the Federal Trade Commission (the other members would support such a modification only if there is evidence that the Act has prevented the most qualified personnel from achieving examiner status), and Health, Education and Welfare. Justice opposed the pass/fail proposal.

The consultant's preliminary recommendation was that the Conference enlarge the zone of consideration to the top 15 persons as suggested by the Chief Examiner of the Federal Power Commission, Mr. Joseph Zwerdling, at the April, 1969, hearings of the Committee. As the Federal Power Commission has indicated its willingness to abandon selective certification if offered this larger range of candidates, such a modification might solve the very difficult issue of selective certification and simultaneously permit the individual agencies to weigh the relative utilities of expertise and superior generalist professional qualifications. The enlargement of the zone of consideration without completely abandoning a merit priority system has the advantage, as the Federal Power Commission suggested, of being a less radical modification of the Veterans Preference Act. Further, it has an advantage suggested by the Small Business Administration of preserving a significant portion of the merit priority system since the choice from the top 15 would limit the agency selection to the top ten to fifteen percent of the register.

What the Committee Recommends as to the Veterans Preference Act

The Committee felt that a modest change, enlarging the zone of consideration from three to ten persons, would give the agencies much greater discretion in their choice of examiners. It would reduce the need for reliance upon selective certification and would constitute an expression of confidence in the top career and political appointees of the various agencies and departments. It would enlarge the managerial choice where the managerial responsibilities for the effective conduct of agency business lie.

The Committee also recommends dropping the Veterans Preference Points in regard to the selection of examiners. The Committee felt that such supplementary points had no relevance to the appointment of senior professionals and were beyond the scope of advantages and compensation essential to an effective system of veteran benefits. The Committee noted that such points were inconsistent with the employment of a merit ranking system for the appointment of examiners, if the priorities of the system are construed in terms of making the most capable candidate available to the agency.

Can Examiners Be Trained Subsequent to Appointment?

In an attempt to find some middle ground between the prerequisite specialization of selective certification and the use of the general register, the Committee proposed to the agencies several approaches that involved training of attorneys in administrative specialties prior to their appointment as examiners. These proposals met a variety of criticisms, the most frequently encountered of which was that it would be impossible to persuade high quality attorneys to leave the security of their practice or employment to take a training position with only the possibility of subsequent appointment as an examiner.

In the course of their comments upon this proposal, numerous agencies drew parallels between the Committee's suggestion and the Intern program that had been proposed in recent years by the Civil Service Commission. The Committee then considered the Intern proposal and decided that the Conference should recommend its trial on an experimental basis.

This plan would apply the same stringent standards of the present Hearing Examiner examination except that candidates could be appointed to fill gaps in experience or professional skills that now tend to disqualify them from appointment as hearing examiners. The candidate would be appointed as Hearing Examiner Intern. The internships would be conducted approximately as described in this 1967 draft announcement of the Civil Service Commission:

> A detailed professional development program will be planned and managed by the Civil Service Commission for each hearing examiner intern in the light of his prior education, experience and ability. The successful completion of 2 years internship should provide the intern with the full qualifications required by the competitive standards for a hearing examiner. The Civil Service Commission will periodically review the progress and development of each intern and prior to the end of internship determine his eligibility for appointment as a hearing examiner in the light of the hearing examiner qualifications standards. The Commission's review will consider the intern's record and performance, including evaluations of the intern's work by supervisors and others to assure that he meets the full competitive standards for hearing examiner. On the basis of the entire record and a final interview with the intern by a specially designated panel consisting of three people, a final rating will be assigned and such rating will be transferred to the hearing examiner examination for consideration for appointment to such position.
>
> Those found not to be satisfactory during the internship will be separated from the intern position. If the Commission's panel, upon completion of the internship, determines that the intern is not eligible in all respects for appointment as a hearing examiner, the intern will be rated ineligible for such appointment and separated from the intern position. The intern so separated may be considered for reassignment or transfer to other positions in the Federal Service for which he is eligible.
>
> The intern may be continued in his intern position until an appointment can be made, but not to exceed one year. Thereafter, if not appointed, the intern's eligibility may be continued so long as he occupies a position the duties of which are such as to preserve his competence for a hearing examiner position.
>
> (U.S. Civil Service Commission, "DRAFT ANNOUNCEMENT OF AN EXAMINATION FOR POSITION OF HEARING EXAMINER INTERN GS-14")

It might seem improper for the Committee to adopt such a plan in *specific detail* without a full examination of it and an opportunity for all interested agencies to comment upon it prior to a recommendation to the Administrative Conference. Nevertheless, the plan has already had considerable discussion throughout Government agencies, and professional groups such as the American Bar Association have commented upon it specifically in their responses to this Committee.

Thus, it would seem proper for the Committee to put before the Conference the suggestion that the Civil Service Commission adopt experimentally a Hearing Examiner Intern Program. The Intern Plan raises questions similar to the questions raised by the Committee's "Administrative Law Specialist" proposal and the Intern Plan meets the objections of impracticality raised against that proposal.

It might be noted that the American Bar Association has urged the establishment of an intern program if it contained certain safeguards, such as the elimination of applicability of selective certification, placement of the retention decision in the Civil Service Commission and not in the employing agency, training for appointment to all agencies and not for a particular agency, use of the program as a supplement to the examination system and adoption of such a program on an experimental basis. These provisos obviously raise some of the conflicts discussed above under selective certification and illustrate why the Committee cannot adopt an unequivocal endorsement of the intern plan as it now stands. Nevertheless, the plan offers a solution to the need for specilization and/or administrative law experience. It received at least limited endorsement in the survey responses from: Atomic Energy Commission, Civil Service Commission, Federal Trade Commission, Health, Education and Welfare, and Interstate Commerce Commission.

What the Committee Recommends as to an Intern Program

The Committee recommends that the Conference endorse the establishment of an experimental intern program for hearing examiners. Such a program would be a supplementary source of examiner candidates. It would be established in conjunction with agencies utilizing examiners and would reflect their individual needs. Such questions as whether the interns would be available for appointment to all agencies or might be more specifically assigned to agencies undertaking their training would have to be settled by the Civil Service Commission. The Conference is not being asked to endorse the program in detail, but merely to encourage the initiation of such a supplementary program.

C. Continuing Training for Government Attorneys and Examiners

Recommendation 10

> That departments and agencies employing attorneys and examiners encourage their participation in programs of continuing legal education and budget for sufficient personnel

> so that attorneys and examiners may be released for reasonable periods of time to accomplish such training.

Recommendation 11

> That departments and agencies explore ways by which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual departments and agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

Recommendation 12

> That departments and agencies review their procedures to make certain that training opportunities appropriate to attorneys are well publicized and that the application procedures for such programs are equally well publicized.

Recommendation 13

> That departments and agencies investigate the possibilities for short-term exchange assignments to other departments or agencies of experienced attorneys of higher grades whose insight and professional effectiveness would be enhanced by exposure to other aspects of the legal problems to which they are assigned.

This topic and the two remaining ones were not significantly controversial, but each addresses an important aspect of attorney development in Government service.

The four recommendations now adopted by the Committee on Personnel are those that were circulated for agency response and comment in the June 16, 1969, survey of agencies.

The proposals in this item, with two exceptions, were greeted generally with overwhelming support by the agencies. The two exceptions were these recommendations: (1) that redundancy in staffs should be budgeted to permit the release of attorneys for training, and (2) that short-term exchange assignments to other departments should be investigated.

Numerous agencies noted the impracticality of expecting such a redundancy of personnel to be approved in budgets. The tenor of the reactions was not that such a proposal was unnecessary or would not be useful, but that it was not feasible for the foreseeable future. Strong support for the principle was given by some agencies.

The suggestion that attorneys be exchanged between agencies was greeted with mixed interest and scepticism. Exchanges were contemplated in the proposal between agencies sharing similar problems, e.g., attorneys in Justice and the Federal Trade Commission with overlapping interests in antitrust matters. The greater the specialization and exclusive jurisdiction of the agency, the less likely such exchanges would prove useful. Some agencies have considered this possibility in the past, but shortages of personnel have made it impractical.

An important aspect of effective training, especially in the Washington, D.C., area, is in the efficient communication to attorneys and their agencies of training opportunities. The Interstate Commerce Commission, in its response to the proposal that agencies seek ways to support and participate in programs of all agencies and institutions when related to the work of the agency, suggested the need for a central clearing house, perhaps through the proposed center for continuing legal education.

It might be noted that in the preparation for the April hearings the Committee offered many detailed proposals as to improving effective agency training but that the response of most agencies and departments was that general recommendations by the Conference would be more helpful than proposals so particularized that their applicability from agency to agency would weaken support for and conformance to the recommendation.

D. CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

Recommendation 14

> That a center be established in the Washington area to provide a facility for the continuing legal education of lawyers in Government service, hearing examiners and private attorneys practicing before Government departments and agencies, to promote coordinated programs within the Government and with specialized segments of the organized bar, to stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education, and to provide a mechanism for the exchange of information as to professional problems of Government attorneys in the various departments and agencies. The Federal Administrative Justice Center proposed by the ABA (resolution adopted by ABA's House of Delegates in January 1969), as an example, will meet these objectives.

This proposal is the result of numerous suggestions received by the Committee late in 1968 as it attempted to frame preliminary recommendations for its second set of hearings. The need that such a center would satisfy is widely recognized and has been the subject of considerable commendable work and promotion by John T. Miller, Jr., Chairman of the Hearing Examiners Committee of the Administrative Law Section of the American Bar Association. His work has resulted in the endorsement by the American Bar Association of the establishment of a Federal Administrative Justice Center. Legislation has been prepared detailing such a center and that legislation illustrates the type of institution that the Committee feels would satisfy this need.*

In circulating its proposals the Committee had reduced its recommendations to four items by the June survey. The first stated generally the need for such a center. The second offered possibilities for its placement; in the Civil Service Commission, subordinate to the Administrative Conference, or as an independent agency. The third indicated that the center should be concerned primarily with applied legal problems. The fourth indicated that the center was not to displace present or future training programs of individual departments and agencies.

Agency responses to these proposals, while not unanimous, were overwhelmingly favorable. Proposal (4) received specific endorsement by a number of agencies already engaged in extensive or highly specialized training. Proposal (3) was criticized by some agencies as unnecessarily restricting the staff of the center, it being suggested that such policies should be left to the administrators of the center. Still, the thrust of (3) toward applied legal problems was generally accepted.

The only aspect of the proposal that divided the agencies in significant numbers was (2) dealing with the location of the center. It should be pointed out that if the agency is established in the Civil Service Commission or other existing agency of the Government, the Government Employees Training Act would permit the establishment of such a center without additional legislation.

Five agencies explicitly recommended or accepted the establishment of such a center in the Civil Service Commission. Five agencies explicitly recommended or accepted the establishment of such a center subordinate to the Administrative Conference of the U.S. Eight agencies explicitly recommended or accepted the establishment of such a center as an independent agency. The Atomic Energy Commission suggested that it be established independent of the Government to facilitate its use by the private bar and to avoid the traditional restraints on Government agencies. The Civil Service Commission pointed out that it has accumulated experience in developing career educational centers somewhat analogous to the proposed legal center, such as the Federal Executive Institute in Charlottesville, Va., and the two Executive Seminar Centers, at Kings Point, N.Y., and Berkeley, Calif., respectively. The Small Business Administration suggested that it might be established in the Department of Justice, with its placement reconsidered for possible relocation in the Civil Service Commission if lawyers are brought under the competitive service system.

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*The Committee has reproduced copies of the Administrative Law Section's report for the American Bar Association detailing its proposed center for continuing legal education. The Committee will provide any interested person a copy of this report upon request.

The consultant's recommendation was that the center be established subordinate to the Civil Service Commission, with an expectation that this decision be reexamined once it is established and operating to determine whether it should be relocated. The Commission has the greatest amount of experience in organizing such facilities and would offer the immediate advantage of avoiding the necessity of additional legislation.

The Committee decided to leave for the Conference the option of supporting the ABA proposed legislation, creating an independent center, or creating a center under the auspices of either the Conference or the Civil Service Commission.

RECOMMENDATION NO. 18

PARTIES DEFENDANT

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

RECOMMENDATION

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules of Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

2. Congress should enact legislation:

(a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them.

(b) Amending section 1391(e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

(c) Amending section 1391(e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in action in which nonfederal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW IN SUPPORT OF RECOMMENDATION NO. 18

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I. INTRODUCTION

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the wrong defendant was named or served. *Gnotta* v. *United States*[1] is illustrative. Gnotta, an engineer of Italian descent employed in a field office of the Army Corps of Engineers, remained in his initial grade of appointment after a dozen years of service. He charged that his superiors had refused to provide him opportunities for advancement because of his ethnic origin. An executive order proscribes such discrimination unequivocally and provides "for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment" by the employing agency and the Civil Service Commission.[2] The Commission held a lengthy hearing at which testimony supporting and contradicting Gnotta's claim of discrimination was received. After an adverse determination by the Commission, Gnotta sought judicial review in a suit in a United States district court, naming as defendants the United States, the Department of the Army, the Civil Service Commission, and seven employees of the Army Corps of Engineers who supervised his work. The district court dismissed the suit on the ground "that Gnotta's selected procedure and his choice of defendants raise serious questions of governmental immunity and of consequent jurisdiction."[3] The United States Court of Appeals for the Eighth Circuit affirmed the dismissal, holding that "Gnotta's appeal necessarily falls because of the identity of the defendants he had chosen to sue."[4]

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[1] 415 F.2d 1271 (8th Cir. 1969).

[2] Exec. Order No. 11,246 (1965), 30 Fed. Reg. 12,319.

[3] 415 F.2d at 1276. The district court decision is unreported.

Why were the defendants chosen by Gnotta improper? The court listed these reasons:

> (1) "One cannot sue the United States without its consent . . . ;"[5]
>
> (2) The Department of the Army and the seven individual officers could also cloak themselves in the mantle of the sovereign;[6] and
>
> (3) "Congress has not constituted the [Civil Service] Commission a body corporate or authorized it to be sued *eo nomine*."[7] Poor Gnotta, in suing "the United States Civil Service Commission" failed to understand that the Supreme Court had required that actions attacking determinations of the Commission must be brought not against the Commission but against its individual members.

One's sense of justice would not be pricked if the court, reaching the merits, had decided that the administrative determination was supported by substantial evidence. Somewhat less satisfying, but tolerable, would have been a decision in which the court, after wrestling with federal civil service law and regulations, held that adverse determinations of the Civil Service Commission were subject to only limited review[8] or that the particular matter of personnel advancement was "committed to agency discretion by law" and hence nonreviewable.[9] But it is disheartening that technical and foolish rules about parties defendant should foreclose judicial review of federal administrative action.

The tangled web of problems involving parties defendant in judicial-review actions has been ameliorated over the years, but substantial room for improvement remains. The ultimate goal has been clearly stated by the Supreme Court: modern procedure "reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[s] the principle that the purpose of pleading is to facilitate a proper decision on the merits." [10] What is true of ordinary civil litigation is even more true when a citizen is attempting to obtain redress from his government. The ends of justice are not served when Government attorneys advance highly technical rules in order to prevent a determination on the merits of what may be just claims.[11]

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[4] 415 F.2d at 1276.

[5] 415 F.2d at 1276, citing United States v. Sherwood, 312 U.S. 584, 586–88 (1941).

[6] 415 F.2d 1271, 1277. Enactment by Congress of legislation implementing Recommendation 9 of the Administrative Conference of the United States, adopted October 21, 1969, would eliminate the sovereign immunity objection in a case of this type.

[7] 415 F.2d at 1277, citing Blackmar v. Guerre, 342 U.S. 512, 514–16 (1952); Bell v. Groak, 371 F.2d 202, 204 (7th Cir. 1966). It should be noted that if Gnotta had named "Members of the United States Civil Service Commission" as parties defendant, and served process on them, his complaint could not have been dismissed, since Federal Rule 25(d) permits a public office to be described by title rather than individual name.

[8] Compare Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (judicial review of the discharge of a federal employee is limited to determining whether the employee received the protection of prescribed administrative procedures), affd by an equally divided Court, 341 U.S. 918 (1951), with Charlton v. United States, 412 F.2d 390 (3d Cir. 1969) (scope of judicial review is governed by the Administrative Procedure Act).

[9] See, e.g., Keim v. United States, 177 U.S. 290 (1900); McEachern v. United States, 321 F.2d 31, 33 (4th Cir. 1963). The court in *Gnotta*, stating that "promotion . . . of employees . . . is a matter of supervisory discretion and not subject to judicial review," considered resting its decision on this ground, but concluded that a charge of ethnic discrimination could not be bypassed in this way. 415 F.2d at 1275–76.

The numerous problems relating to parties defendant can be cured by (1) recognition and acceptance by the Department of Justice that Congress and the draftsmen of the Federal Rules of Civil Procedure have provided a solution for most of the problems that arise when the plaintiff sues the wrong defendant or fails to join a superior officer; [12] (2) amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them; [13] and (3) adopting several minor changes in the language of section 1391(e) of title 28—the venue provision of the Mandamus and Venue Act of 1962.[14]

II. PRIOR ATTEMPTS TO PROVIDE SOLUTIONS

The unsatisfactory state of the law of parties defendant has been recognized for some time [15] and three attempts have now been made to cure the deficiencies. *First,* Congress, in 1962, amended section 1391(e) of title 28 in order to allow broadened venue and extraterritorial service in suits against federal officers and thus to circumvent the formally troublesome requirement that superior officers be joined as parties defendant. *Second,* rule 25(d) of the Federal Rules of Civil Procedure was amended in 1961 to provide for the automatic substitution of successors in office. That rule also states that "any misnomer not affecting the substantial rights of the parties shall be disregarded" and that the officer may be "described as a party by his official title rather than by name." *Third,* rule 15(c) of the Federal Rules was amended in 1966 to deal with a plaintiff's failure to name any appropriate officer or agency as defendant. Each of these three remedial provisions will now be discussed in detail.

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[10] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[11] Professor Davis asks whether the Government should "spend taxpayers' money to pay government lawyers to use their ingenuity in developing technical complexities that will prevent plaintiffs from getting their cases decided on the merits. . . ." Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435, 439 (1962).

[12] See text accompanying notes 16–20 *infra*.

[13] See text accompanying notes 54–59 *infra*. This suggestion has already been adopted by the Administrative Conference of the United States as part of Recommendation 9 of the Conference (October 21, 1969).

[14] See text accompanying notes 60–65 *infra*, and the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report. A minor anomaly in the coverage of § 1391(e) may also deserve legislative correction. Because various territories of the United States are not "judicial districts" within the meaning of 28 U.S.C. § 451 (1964), the extraterritorial service of process and broadened venue of § 1391(e) are not available. See Doyle v. Fleming, 219 F. Supp. 277 (D.C.Z. 1963) (quashing service of process under § 1391(e) because Canal Zone is not a "judicial district"); Canal Zone Central Labor Union v. Flemming, 246 F. Supp. 998 (D.C.Z. 1965) (same) revd. on other grounds sub nom. Leber v. Canal Zone Central Labor Union, 383 F.2d 110, 113 n.3 (5th Cir. 1967). Requiring the Secretary of the Army to defend an action in the Canal Zone or Guam places no greater burden on Government attorneys than does sending them to defend an action in Hawaii. The omission of territorial courts should be corrected unless considerations with respect to the nature or powers of those courts provide a rational basis for the omission.

[15] See the full discussion in Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action, 77 Harv. L. Rev. 40 (1963); Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435 (1962).

A. Section 1391 (e): Service of Process, Venue, and Indispensable Parties

Apart from section 1391(e) the service in process in nonstatutory review actions is governed by the Federal Rules of Civil Procedure. Rule 4(d)(4) covers the service of process upon the United States. It provides that process must be served by delivery of a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. In addition, a copy of the summons and complaint must be sent by registered or certified mail to the Attorney General of the United States in Washington, D.C. Failure to notify the Attorney General has been held to require dismissal,[16] although a few decisions prior to the 1966 amendment of rule 15(c)[17] permit the defect to be cured when dismissal would mean the barring of plaintiff's claim because of the running of the statute of limitations.[18] Moreover, in an action against the United States attacking the validity of an order of a federal officer or agency, if the officer or agency has not been made a party to the action, a copy of the summons and complaint must also be sent by registered or certified mail to the relevant federal officer or agency.

Rule 4(d)(5), which supersedes prior inconsistent statutes, must be followed to effect service of process on an officer or agency of the United States. A copy of the summons and complaint must be delivered to the officer or agency being sued and service must be made on the United States itself as provided for in rule 4(d)(4). If the federal agency involved is a corporation, rule 4(d)(5) requires that service also be made on the agent of the corporation as provided in rule 4(d)(3), in addition to service upon the United States under rule 4(d)(4).[19]

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[16] Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968); Messenger v. United States, 231 F.2d 328 (2d Cir. 1956); Lemmon v. Social Security Administration, 20 F.R.D. 215 (E.D.S.C. 1957).

[17] The "relation back" amendment of rule 15(c) is discussed in the text accompanying notes 43–49 *infra.*

[18] Rollins v. United States, 286 F.2d 761, 768 (9th Cir. 1961); Fugle v. United States, 157 F. Supp. 81 (D. Mont. 1957).

Section 1391(e), which was added to the Judicial Code in 1962,[20] dispenses with the requirement of personal service in actions in which each defendant is an officer or employee of the United States or any agency thereof, acting in his official capacity or under color of legal authority. Nationwide service of process in such actions has circumvented difficulties stemming from holdings that superior officers are indispensable parties, and has allowed the citizen to sue his Government in a local federal district court. The provision reflects a congressional decision that "[r]equiring the Government to defend Government officials and agencies in places other than Washington" is fairer to citizens and is not "a burdensome imposition" on the Government.[21] In cases of this type, delivery of the summons and complaint may be by certified mail rather than personal delivery if the officer or agency to be served is beyond the territorial limits of the district in which the action is brought. Other aspects of rule 4, however, continue to be applicable. Thus in any such case service must be made upon the United States by notifying the Attorney General as provided in rule 4(d)(4).

With respect to venue, section 1391(e) allows actions against federal officers or agencies, acting in their official capacity or under color of legal authority, to be brought in the district in which "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."[22] Although adopted as part of the Mandamus and Venue Act of 1962,[23] section 1391(e) is not limited to mandamus actions but applies broadly to all types of suits against federal officers or agencies except those governed by a special statutory review provision that deals with venue.[24]

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[19] For an excellent discussion of rule 4(d)(5), see 4 C. Wright & A. Miller, Federal Practice and Procedure §§ 1106–07 (1969).

[20] Section 1391(e) is the venue part of the Mandamus and Venue Act of 1962. 28 U.S.C. § 1391(e) (1964).

[21] H. R. Rep. No. 536, 87th Cong., 1st Sess. (1961).

[22] For excellent general discussions of the Mandamus and Venue Act of 1962, see Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo. L.J. 19 (1964).

[23] See note 20 *supra*.

Section 1391(e) is phrased in terms of suits against officers and does not appear to be applicable to suits against the United States *eo nomine*. Detailed venue provisions govern suits against the United States.[25] If plaintiffs were to be given an option of suing the United States in addition to or in lieu of suing the officer, section 1391(e) would need to be broadened to control venue in such actions.[26]

By allowing nationwide substituted service on the superior officer, section 1391(e) circumvents the technical requirement that superior officers be joined as parties defendant. A long line of cases established the proposition, easy to state but difficult to apply, that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." [27] Prior to the enactment of section 1391(e), limitations on venue and on service of process often gave decisive significance to the plaintiff's failure to join a superior officer.[28] Broadened venue and extraterritorial service under section 1391(e), however, have, for the most part, eliminated the importance of the indispensability doctrine, since the superior officer can now be joined as a defndant in any local district court. The legislative history of the section demonstrates that the law should not be tailored for the convenience of the Government, but that, rather, there should be "readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government." [29] The Congress noted that the law of parties defendant was not altogether clear in either logic or consistency and that such actions "are in essence against the United States."[30] Hence Congress seems committed to providing a path through the procedural maze.

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[24] See Jacoby, *supra* note 22, at 32.

[25] *E.g.*, 28 U.S.C. § 1402(a) (1964) (tax refund claims against United States); 28 U.S.C. § 1402(b) (1964) (tort claims against United States).

[26] See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report, which would add actions against "the United States" to the categories of cases in which venue and service of process are governed by that section. The addition of the United States to the general venue provisions of section 1391 would not displace the special venue provisions applicable to the United States (see note 25 *supra*) since special venue provisions would override the general provision.

[27] Williams v. Fanning, 332 U.S. 490, 439 (1947) (the Postmaster General was not indispensable to a suit against a local postmaster, because the latter could resume delivery of mail properly withheld). For an ample impression of the degree of confusion in the case law, see Davis, *supra* note 11, at 438–51.

[28] Since venue was proper only where "all defendants reside" or where "the claim arose," 28 U.S.C. § 1391(b) (1964), and since service of process could not be effected on a superior in the plaintiff's home district, the plaintiff's only choice was to sue the superior in the District of Columbia. Limitations on venue and service of process thus had the effect, when combined with the indispensable party rule, of centralizing in the District of Columbia a great deal of nonstatutory review of federal administrative action, thereby causing inconvenience and expense to distant plaintiffs. See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review, 75 Harv. L. Rev. 1479, 1493–99 (1962).

[29] H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961).

The confusing law governing the required joinder of superior officers,[31] however, has been circumvented rather than eliminated. Government attorneys who are more interested in scoring tactical points than in obtaining just results may still argue that an unjoined superior is indispensable and that he cannot be joined at a later time if the passage of time creates a bar.[32] That argument should be rejected. The remedial purposes of the 1966 amendment to rule 15(c) of the Federal Rules clearly contemplate that an amendment adding a superior officer relates back to the filing of the original complaint if process has been served on the Government's lawyers.[33] The inevitable uncertainty implicit in attempting to unravel the authority of officials in order to ascertain whether a subordinate indeed has authority to afford the relief sought can be met, of course, by joining all possible officers as parties defendant. But plaintiffs who do not thus encumber their complaints cannot properly be thrown out of court. In view of the liberal "relation back" provisions of rule 15(c), Government lawyers should take prompt steps to remedy any defects arising from the nonjoinder of superior officers. The Department of Justice should instruct United States Attorneys to assist plaintiffs in curing such defects, rather than to move for dismissal on that ground.[34]

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[30] *Id.*

[31] Compare Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) (the Secretary of the Interior is not an indispensable party to a suit to enjoin a regional director from enforcing regulations interfering with plaintiff's fishing rights), with Blackmar v. Guerre, 342 U.S. 512 (1952) (members of the Civil Service Commission are indispensable parties to a reinstatement action brought by a discharged employee against his regional supervisor).

[32] In some situations, such as review of social security determinations, a statute of limitations bars a review proceeding that is not properly brought within a designated period (see note 47 *infra*). In other situations the doctrine of laches performs a similar function. Dismissal may also result because the plaintiff has failed to perfect service of process within a reasonable time (see cases cited in note 16 *supra*).

In Bell v. Groak, 371 F.2d 202 (7th Cir. 1966), a discharged postal employee sought mandatory relief to require the Civil Service Commission to entertain his administrative appeal. The suit was brought against the Chairman of the Commission as an individual. After the Government had objected that the other members of the Commission were indispensable parties, the complaint was amended to join them, but no attempt was made to serve processs on them. On appeal, the failure to perfect service resulted in dismissal even though the decision below was not based on that ground. If the plaintiff had had warning, he might have requested time within which to perfect service.

[33] See discussion of rule 15(c) in the text accompanying notes 43–49 *infra*. See also the explanation of the purpose of the 1966 amendment to rule 15(c) in the Advisory Committee's Note, reprinted in 3 J. Moore, Federal Practice 461–63 (1968).

[34] See text accompanying note 66 *infra*.

B. *Rule 25 (d): Substitution of Successor Officers and Misnomer*

Prior to its amendment in 1961, the provision of rule 25(d) of the Federal Rules, which deals with the continuance of actions brought by or against public officers who died or were separated from office, was "a trap for unsuspecting litigants . . . unworthy of a great government." [35] Authoritative Supreme Court decisions had construed the language of rule 25(d) to require abatement of an action in which plaintiff failed to substitute a successor officer within six months after the original defendant had died or left office.[36] A general recognition that this harsh rule produced unjust results provided the impetus for the 1961 amendment.[37]

As amended in 1961, rule 25(d) provides for automatic substitution of public officers.[38] It eliminates the needless formality of numerous orders of substitution in situations in which a public officer, by whose name or against whom a great many actions have been brought, dies or resigns. If, as frequently happens, the parties and the court are unaware of the change in the office, the litigation can be continued under the name by which the action was commenced without affecting its validity. When and if the Government raises the question, the name can be changed, no matter how much time has elapsed.[39]

The Advisory Committee's note to the 1961 amendment makes it clear that "mistaken analogies to the doctrine of sovereign immunity" should not control the determination of whether the officer is acting "in his official capacity" within the meaning of the rule.[40] A common-sense approach makes the rule applicable "to any action brought in form against a named officer, but intrinsically against the government. . . ." [41] Thus, rule 25(d) is applicable except when the officer is not acting under color of federal law or when he is personally liable in damages. Problems with respect to the substitution of officers have been eliminated.

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[35] Vibra Brush Corp. v. Schaffer, 256 F.2d 681, 684 (2d Cir. 1958).

[36] Klaw v. Schaffer, 357 U.S. 346 (1958); McGrath v. National Assn. of Manufacturers, 344 U.S. 804 (1952); Snyder v. Buck, 340 U.S. 15 (1950).

[37] See, *e.g.*, Davis, Government Officers as Defendants: Two Troublesome Problems, 104 U. Pa. L. Rev. 68 (1955).

[38] Fed. R. Civ. P. 25(d)(1): "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution."

[39] For an excellent discussion of the meaning and application of the amended rule, see Wright, Substitution of Public Officers: The 1961 Amendment to Rule 25(d), 27 F.R.D. 221 (1962).

[40] Advisory Committee Note to 1961 amendment, reprinted in 3B J. Moore, Federal Practice 578 (1968).

[41] *Id.*

Rule 25(d) also deals with the problem of misnomer. The constant growth and reorganization of the Federal Government make it difficult for even the well-informed citizen to be certain which officer or agency is responsible for a particular activity and under what official title. A statute often empowers a cabinet-level secretary to perform a particular function to a subordinate; the secretary later delegates the function to a subordinate; a subsequent legislative reoragnization proposal vests the function in a semi-autonomous board within the department; and later legislation may even transfer the board and function to another department. Instances of this type, in which it is difficult to determine precisely who is responsible for a particular activity are frequent and familiar. The need is to ensure that a plaintiff who makes his intent to review a particular administrative activity fairly clear is not thrown out of court on the ground of misnomer. Rule 25(d) of the Federal Rules of Civil Procedure attempts to solve the problem by providing that "any misnomer not affecting the substantial rights of the parties shall be disregarded" and that the officer may be "described as a party by his official title rather than by name." The use of the official title without any mention of the officer individually recognizes the intrinsic character of the action and assists in eliminating concern with the problem of substitution. In fact, when an action is brought by or against a board or an agency that has continuity of existence, naming the individual members serves no useful purpose.[42]

C. *Rule 15 (c): Failure To Name Any Appropriate Defendant*

In some instances, the problem is more than misnomer and involves the failure to name any appropriate officer or agency as defendant. With respect to such a situation, unjust results were frequent prior to the 1966 amendment to rule 15(c). In these cases, most of which involved attempts to obtain judicial review of social security disability determinations, the plaintiffs mistakenly named as defendants the United States,[43] the Department of Health, Education, and Welfare,[44] the "Federal Security Administration" (a predecessor agency),[45] and a Secretary who had retired from office nineteen days before.[46] The statutory review provision requires that judicial review of denials of social security benefits be brought against the Secretary within sixty days.[47] By the time the claimants discovered their mistakes, the statutory limitation period had expired, and they were denied judicial review.[48] Academic criticism of these decisions [49] led to the inclusion of a curative provision in the 1966 amendment to rule 15(c). That provision states that an amendment of the pleadings, adding or changing parties defendant in actions "with respect to the United States or any agency or officer thereof," relates back to the date of the original pleading whenever process was delivered or mailed "to the United States Attorney or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named." This sentence allows a plaintiff who is in doubt about the identity of the proper officer or agency to commence his action by serving process on one of those designated parties. Difficulty in ascertaining the proper defendant is often understandable in light of the vast array of Government officers and agencies and in light of the technicalities that govern parties defendant. Under rule 15(c) the plaintiff who has served any one of the persons designated may correct his pleading when the United States moves to dismiss on grounds that a particular officer was not named or joined as a defendant.[50] Dismissal is

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[42] See 3B J. Moore, Federal Practice ¶ 25.09 (1968); Comment, 52 Mich. L. Rev. 433, 450 (1952).

[43] Cunningham v. United States, 199 F. Supp. 541 (W.D. Mo. 1959).

[44] Hall v. Department of Health, Education & Welfare, 199 F. Supp. 833 (S.D. Tex. 1960).

[45] Cohn v. Federal Security Administration, 199 F. Supp. 884 (W.D.N.Y. 1961).

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[46] Sandridge v. Folsom, 200 F. Supp. 25 (M.D. Tenn. 1959).

[47] 42 U.S.C. § 405(g) (1964).

[48] It is only fair to point out that Government took administrative steps to cure the problem. The Department of Justice instructed United States Attorneys "to take especial pains to be sure that our practice of advising the plaintiff of the defect is followed where the plaintiff's failure is noted before the running of the sixty-day limitation period." Department of Justice Memorandum No. 380 (July 14, 1964). The Secretary of Health, Education, and Welfare issued a regulation liberally authorizing an extension of time within which to file a new suit when an incorrect defendant had been served within the statutory period. 29 Fed. Reg. 8209 (1964), 20 C.F.R. § 404.954(b).

The problem, however, is not confined to social security disability determinations. See, *e.g.*, Bell v. Groak, 371 F.2d 202 (7th Cir. 1966) (failure to perfect service on all members of the Civil Service Commission); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964) (the plaintiff named as defendants the Bureau of Land Management and the Department of Interior rather than individual officers; the court held that the named defendants "are not suable entities"; M. G. Davis Co. v. SEC, 252 F.Supp. 402 action of the Securities and Exchange Commission must be brought against its individual members).

[49] See Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action, 77 Harv. L. Rev. 40 (1963).

[50] Cases holding to the contrary either were decided prior to the 1966 amendment of rule 15(c) or they are erroneous. In Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), for example, in which the court dismissed an action because the proper officer was not served, the court's attention was not directed to the amendment of rule 15(c).

There is a degree of tension between rule 4(d)(4) and rule 15(c). When the action "attack[s] the validity of an order of an officer or agency not made a party," rule 4(d)(4) requires that a copy of the summons and complaint be sent by registered mail to such officer or agency. Dismissals have resulted in some cases when the plaintiff has failed to perfect service on the officer or agency within a reasonable time. Compare cases cited in proper under the amended Rules only when the plaintiff fails to amend his pleading and to complete service on the proper officer within a reasonable time after the defect is raised.

A liberal application of these three remedial provisions should prevent dismissals based on technicalities of the law of officers, for the Congress and the draftsmen of the Federal Rules have indicated with great clarity that actions challenging federal conduct should be decided on the merits rather than on narrow procedural grounds. Unfortunately, however, the attempts of Congress and the draftsmen to ameliorate the law of parties defendant have not been entirely successful. That failure results from the fact that no attempt was made to change the law of parties defendant, but only to alleviate particular problems that had proven troublesome. Moreover, neither the Department of Justice nor lower courts have accorded these measures the liberal reception they deserve. Elimination of difficulties in this area will come only if the choice of defendants and their capacity to be sued is dealt with directly. Consequently, further changes are required.

III. Proposals for Reform

The partial elimination of sovereign immunity, proposed in Recommendation 9 of the Administrative Conference,[51] will help in solving the problems in the law of parties defendant by eliminating the related notion that the United States is an indispensable party to certain actions. But even if the sovereign immunity and indispensable party doctrines are eliminated as a barrier to judicial review of federal administrative action, the technical requirements with respect to parties defendant will remain as troublesome relics of the past. Thus, the elimination of sovereign immunity is not enough; the technicalities themselves must be eliminated. This goal can be accomplished by two amendments to the United States Code. The first is an amendment to section 703 of title 5, which is concerned with form of proceeding in actions for judicial review, to add the following language:

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note 16 *supra*, with cases cited in note 18 *supra*. On the other hand, rule 15(c) contemplates great liberality in amending a complaint to add an additional defendant who is indispensable, so long as the Government has received notice of the action by service being made upon the local United States Attorney, the Attorney General, or an officer or agency who would be a proper defendant if named. The underlying purpose of rule 15(c)—that a plaintiff's claim against the Government should not be dismissed because the wrong defendants were named—should take precedence over older notions requiring service to be performed with punctillious exactitude.

[51] Recommendation 9, Administrative Conference of the United States (October 21, 1969).

> If no special statutory review procedure is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.[52]

The second reform is the amendment of section 1391(e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which nonfederal defendants who can be served within the states in which the action is brought are joined with federal defendants.[53] Such a provision would eliminate improper venue as an objection to such joinder, but would not affect the discretion of the court under the Federal Rules to determine that joinder was improper or not in the interests of justice in a particular case.

A. *Section 703: Capacity to Sue an Agency by Its Official Title and Capacity to Sue the United States*

When an instrumentality of the United States is the real defendant, and an authorized legal representative of the United States has been served, the names on the pleading should be irrelevant. The plaintiff should have the option of naming as defendants the United States, the agency by its official title, appropriate officers, or any combination of them, and the outcome should not turn on the plaintiff's choice. The proposed amendment of section 703 will accomplish these ends.

1. *Capacity to sue an agency by its official title.* The lower federal courts, at the behest of Government lawyers, continue to dismiss actions of which the Government has received adequate notice, on the ground that other names should have gone on the pleadings. A recent suit against "the Chairman, Civil Service Commission" was dismissed because the other Commissioners were indispensable parties.[54] Since rule 25(d) provides that a public officer "may be described as a party by his official title rather than by name," the defect would not have been present if the suit had been brought against "the members of the United States Civil Service Commission." Dismissals of this type since the effective date of the 1966 amendment to rule 15(c) are questionable, since rule 15(c) allows the plaintiff who has served

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[52] The quoted sentence was included in Recommendation 9 of the Administrative Conference of the United States, adopted on October 21, 1969. Recommendation 9 also would amend 5 U.S.C. § 702 to add the following sentence: "The United States may be named as a defendant in any such action [for judicial review of administrative action], and a judgment or decree may be entered against the United States."

[53] See the proposed revision of 28 U.S.C. § 1391(e) in the conclusion of this Report.

[54] Congress of Racial Equality v. Commissioner, 270 F. Supp. 537, 542 (D.Md. 1967) (alternative holding). See also Bell v. Groak, 371 F.2d 202 (7th Cir. 1966).

process on the local United States Attorney, the Attorney General, or the agency to amend his pleading without penalty.[55]

Allowing the plaintiff to sue the agency by its official title would be a step in the right direction.[56] Under the proposal an "agency," as defined in the APA, would possess a limited capacity to be sued, applicable only to actions seeking judicial review of the agency's activities. The agency could not be sued in other types of actions, such as one to recover damages in tort. In this way, one common type of defect concerning the naming of parties defendant would disappear.

2. *Capacity to sue the United States.* The suit against the officer, challenging his official conduct, served a useful purpose as a device for circumventing the sovereign immunity doctrine. Once sovereign immunity is tamed, however, requiring the plaintiff to cast his suit in that form is no longer essential. Everyone recognizes that the suit is in fact against the United States or one of its agencies and involves the legality of governmental action. The important objective at this point is to eliminate any remaining technical requirements. This objective is best achieved by allowing the plaintiff a wide choice in naming defendants and sanctioning his choice whatever it may be. The United States should be one of the available alternatives. The complaint, of course, must indicate the nature of the plaintiff's claim and service of process under rule 4(d)(4) will suffice to give Government lawyers adequate notice of the claim.

Professor Davis has urged the adoption of a statutory proposal that would tie the elimination of sovereign immunity to a form of suit in which the United States is named as defendant.[57] That proposal would discourage the suit against the officer and gradually displace it with an action against the United States. One objection to Davis' position is that a mandatory requirement of form of suit creates a new technical trap that some lawyers and plaintiffs would be certain to fall into. Moreover, the profession is familiar with the suit against the officer or agency, and federal statutes and the Federal Rules of Civil Procedure have been drafted in the light of existing practice. Fundamental changes in the form of the suit would require reconsideration and possible revision of these other provisions.[58] Settled rules concerning legal representation of governmental interests might also be affected.[59] Besides, the form of suit against the officer or agency, when relieved of the artificialities of the sovereign immunity doctrine, is not distasteful. On the contrary, the individual is in fact complaining about the conduct of a particular officer or agency and there may be psychic advantages in allowing him to bring his suit against the officer or agency that allegedly has harmed him. In addition, the anonymity of the United States will bury all cases involving nonstatutory review in indices and case finders with all criminal cases and damage cases under the uninformative heading of "Doe v. United States." The nature of the case is revealed much more by "Laird" or "Doe v. Secretary of Defense."

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[55] See text accompanying notes 33, 50 *supra*.

[56] The Task Force of Legal Services and Procedures of the Commission on Reorganization of the Executive Branch (Second Hoover Commission) recommended that "any problem of just who the true defendant is" should be avoided by allowing proceedings for review to be brought against "(1) the agency by its official title, (2) individuals who comprise the agency, or (3) any person representing an agency, or acting on its behalf or under color of its authority." Report 211 (March 1955).

Proposed revisions of the APA have also included language amending § 10(b), now 5 U.S.C. § 703, to provide that "[t]he action for judicial review may be brought against the agency by its official title." An accompanying committee report stated: "This language would not preclude the bringing of the action against the individual comprising the agency or any person representing the agency or acting on its behalf in the matter under review. Bringing the action against the agency by name, however, would be simpler and more effective and would avoid those technical difficulties encountered in the past when the officials against whom an action was brought have resigned or have died or have been replaced for some other reason." S. Rep. No. 1234, 89th Cong., 1st Sess. 23 (1966).

[57] The statutory proposal advanced in 3 K. Davis, Administrative Law Treatise § 27.10, at 165 (Supp. 1968), did not tie waiver of sovereign immunity to a form of suit in which the United States is named as defendant, but Professor Davis has advanced this position in subsequent letters and memoranda sent to the author.

The problems with the suit against the officer or agency, then, are not in its form. Rather the problems revolve around the technical rules that some courts have applied on such matters as capacity of an agency to be sued, identification of the proper officer, and indispensability of superior officers. Most of these matters have been solved, and the proposal advanced in this Report would complete the task.

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[58] Revision of § 1391(e) of the Judicial Code to allow the use of extraterritorial service of process and local venue when the United States is named as a defendant in an action for judicial review is desirable in its own right. Section 1391(e) at present does not appear to be applicable to suits against the United States *eo nomine*, since the United States cannot be considered to be an "officer or agency" of the United States. Although there is a special venue provision dealing with actions in which the United States is a defendant, that provision, 28 U.S.C. § 1402 (1964), applies to only three kinds of damage actions brought under 28 U.S.C. § 1346 (1964) (Tucker Act cases, Federal Tort Claims Act cases, and federal tax cases). In addition, the general venue provision applicable to federal-question cases, 28 U.S.C. § 1391(b) (1964), is difficult to apply, since it allows the action to be brought only in the district in which "all defendants reside, or in which the claim arose." If the United States, like a corporation, resides where it is doing business, that is, everywhere, the general venue provision of § 1391(b) is too broad, since suit could be brought on any claim in any judicial district chosen by the plaintiff. On the other hand, if, as seems more likely, a residence cannot be attributed to the United States, the action may be brought only where the cause of action arose, a much narrower venue choice than that provided by 28 U.S.C. § 1391(e) (1964), which was drafted with the situation of the suit against the officer in mind. In short, broadened venue of judicial review actions in which the United States is named as a defendant is a desirable reform in any event. It becomes a necessity if the plaintiff, in order to circumvent sovereign immunity, is required to bring his action against the United States. Without the reform, the inconvenience and unfairness of requiring plaintiffs to come to Washington, D.C. to attack local administration of federal activities would be recreated.

[59] This problem is not likely to be a very serious one. See text accompanying notes 68–70 *infra*.

B. *Section 1391 (e): Joinder of Third Persons as Parties Defendant*

For reasons of its own convenience in litigation, the Department of Justice prefers to have federal interests and federal law resolved in law suits in which the Department can exercise a high degree of control over the joinder of related parties and issues. United States Attorneys are told that "they are not authorized to waive objections as to . . . third-party joinders and the like, without first clearing such matters with the Civil Division [in Washington] which in turn will clear them with the affected agencies." [60] When section 1391(e) was enacted in 1962, the availability of the extraterritorial service of process and the broadened venue was limited—apparently at the behest of the Department of Justice—to judicial review action "in which *each* defendant is an officer or employee of the United States or an agency thereof." [61]

Remarkable as it may seem, there is a conflict of authority on whether the statute means what it says—that the plaintiff cannot join nonfederal third persons as defendants in an action under section 1391(e).[62] Indeed, apart from the language, there is no functional justification for this limitation, for it prevents relief in some situations in which the federal courts can make a special contribution.[63] In many public land controversies, for example, three parties are involved—the official, a successful applicant, and an unsuccessful one. Effective relief cannot be obtained in an action in which the United States or its officer is not involved; but if the Government is named as defendant, section 1391(e) prevents the joinder of the other private person as a defendant, and that person cannot be joined as a plaintiff because his interest is adverse to that of the plaintiff.[64] Another common type of situation in which the limitation is troublesome is that in which specific relief is sought against federal and state officers who are cooperating in a regulatory or enforcement program.[65]

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[60] U.S. Dept. of Justice, Manual for United States Attorneys, Tit. 3, p. 3 (1962).

[61] 28 U.S.C. § 1391(e) (1964) (emphasis added). The legislative history provides no explanation for the inclusion of the word "each." See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962).

[62] Compare Chase Sav. & Loan Assn. v. Federal Home Loan Bank Bd., 269 F. Supp. 965 (E.D.Pa. 1967), in which the court dismissed an action joining the federal board and a local bank, on the ground of improper venue, with Powelton Civil Home Owners Assn. v. HUD, 284 F.Supp. 809, 833 (E.D.Pa. 1968), in which the court held that effectuation of the "apparent intent" of § 1391(e) requires that the "each defendant" language be read as referring "only to defendants who are beyond the forum's territorial limits." Hence, the court held, the joinder of state officers who could be served within the district was proper.

[63] In Town of East Haven v. Eastern Airlines, 282 F. Supp. 507, 510–11 (D. Conn. 1968), the court reluctantly dismissed for improper venue after criticizing the requirement of § 1391(e) that "each" defendant be a federal officer or agency: "The wording does prevent the hardship which could result if a non-government defendant were subjected to the provision's liberal service of process and venue rules merely because the government was also joined as a defendant in the same action. But the wording does appear unnecessarily broad and without justification where there is independent authority for service of process and venue with respect to each non-government party joined as a defendant. The only possible argument in support of the requirement in such instances is that enough of a burden has been placed on government officials and agencies by subjecting them to suits away from their official residences without placing upon them the additional burden of defending a suit with non-government co-defendants. The weakness of this argument is evident. The burden, if it is one at all, cannot be a great one and certainly is minor in comparison to the burden placed on the plaintiff of having to bring separate actions. At any rate, there is no indication that Congress was acting to avoid this additional burden upon the government."

The crux of the matter is whether there are sound reasons of policy for excepting actions brought against federal officers or agencies from the general principles that control party joinder in federal courts. The embarrassment of being joined as a defendant by state officers or private persons with whom it may be alleged that federal officials cooperated does not seem to be a sufficient basis for special treatment. Thus, section 1391(e) should be amended to allow for effective relief and binding judgments in multiple party situations. Deletion of the world "each" and substitution of "a" will accomplish part of this objective. The addition of a new sentence permitting joinder of non-federal defendants who can be served in accordance with the normal rules governing service of process, would cure the venue objection that now stands in the way of convenient and appropriate joinder. Other objections to such joinder, stemming from the discretion vested in the trial judge under the Federal Rules to control the dimension of the lawsuit and to protect particular parties, would be unaffected. Since the plaintiff must state a substantial claim against federal officers, use of this special venue provision as a sham to circumvent other venue requirements will not be a problem.

C. *Role of the Justice Department*

If these statutory reforms are to be effective, the Department of Justice must make firm efforts to instruct its lawyers and

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[64] Section 1391(e) is unavailing in the typical case involving the use of public lands. In such a case, the Secretary of the Interior makes an award to an individual defendant but the plaintiff claims a right to it. The problem arises since the plaintiff is unable to join the Secretary and the individual defendant as parties defendant without creating a venue objection. The same problem of parties emerges, moreover, if the court proceedings take the form of an action between private parties—an action in which the Secretary is not heard and in which the United States may not be named without danger of a dismissal on the ground that the suit is one against the United States and hence not maintainable without the latter's consent. For the protection of third parties, private or governmental, the laws relating to the federal court system are simply inadequate.

[65] See cases cited in notes 62–63 *supra*.

United States Attorneys not to raise technical defects with respect to the naming of parties defendant but to take active steps to cure such defects. Once a plaintiff has stated that gravamen of his complaint and has served process in accordance with rule 4(d)(4), the burden should be on the Department to determine who within our complex federal establishment is responsible for the alleged wrong.[66] If there are reasons for joining that individual or agency as a party defendant, the Department of Justice should take the initiative in adding the desired party defendant. In any case, the Department should *never* urge that a case be dismissed because of technical defects about naming parties defendant.[67]

D. *Legal Representation and Res Judicata*

The proposed amendments advanced with respect to parties defendant raise two potential problems. The first concerns the proposal allowing but not requiring a plaintiff to bring his action for judicial review against the United States: if a plaintiff did bring such an action, would it affect the question of whose lawyers should represent the defendant? The problem arises because the Department of Justice alone is authorized to defend "the United States" in court[68] while a limited number of federal agencies have authority to defend their own orders in suits brought against them. The proposal's potential impact, however, appears to be nonexistent. The provisions authorizing agencies to defend their own orders are generally part of statutory review provisions such as the Judicial Review Act of 1950.[69] Since specific statutory review provisions are unaffected by the proposal, and since nonstatutory review actions against those agencies must now—at least in theory—be defended by the Department of Justice, the opportunity to name the United States could affect the question of representation only if an agency has general authority to represent itself *and* suits to review its orders need not be brought under special statutory review provisions.[70] Although there might be such a situation, none has been found. This particular problem, of course, is of interest only to Government lawyers who are attuned to intragovernmental feuding and are sensitive to the desire of agencies to control the defense of their own activities.

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[66] *Cf.* the provisions of the Crown Proceedings Act of Great Britain. Section 17(3) of that Act provides that in tort claims against the government such "[c]ivil proceedings against the crown shall be instituted against the appropriate authorized Government department, or, if none of the authorized Government departments is appropriate *or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General.*" 10 & 11 Geo. 6, c. 44 (1947).

[67] See text accompanying note 34 *supra.*

[68] See Exec. Order No. 6166 (June 10, 1933), 3 C.F.R. which concentrated all government litigation functions in the Department of Justice. For a partial list of statutes and executive orders with respect to the conduct of government litigation by lawyers of agencies other than the Department of Justice, see D. Schwartz & S. Jacoby, Government Litigation—Cases and Notes 26–27 (1963).

[69] 28 U.S.C. §§ 2341–2351 (Supp. IV, 1965–1968).

The second problem raised by the proposals concerns the effect on the United States of a judgment rendered in a suit against an officer or agency. The theory of the officer's suit is that the officer, by acting unconstitutionally or in excess of his authority, is no longer acting in his official capacity. This fiction allowed circumvention of sovereign immunity, but raised questions concerning the judgment's binding effect on the United States, which was not and could not be made a party.[71] A long line of cases states the rule that the United States is not bound by a judgment in an unconsented in personam action against one of its officers.[72] These cases rest on the premise that, since only Congress can waive sovereign immunity, it would be anomalous to allow the same result to be reached by the decision of a Government lawyer to defend a suit brought against an officer. If sovereign immunity is eliminated in actions for specific relief, however, the limited effect of a judgment against an officer would vanish with the disappearance of its underlying rationale. The suit against the officer who is acting in his official capacity would be seen as it really is—as an action against the United States brought with its consent.

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[70] The authority of the ICC "to appear for and represent the Commission in any case in court" appears to be so broad and specific [49 U.S.C. § 16(11) (1964)] that it would not be overridden by a general provision allowing the plaintiff, in nonstatutory review actions, to name the United States as defendant. The question, of course, might never arise because judicial review of ICC orders is controlled by exclusive and detailed statutory provisions which provide for parties defendant and for separate representation of the Commission by its own lawyers.

[71] See, *e.g.*, Carr v. United States, 98 U.S. 433 (1878), in which the Court held that the United States was not precluded by a judgment in an ejectment suit brought by the present defendant's predecessor against Government agents who were in possession of the disputed land. See also Stanley v. Schwalby, 162 U.S. 255 (1896). In Land v. Dollar, 330 U.S. 731, 736 (1947), in which the Court held that a suit against an officer was not barred by sovereign immunity, Justice Douglas twice stated that "an adjudication [against the officer] is not *res judicata* against the United States because it cannot be made a party to the suit." A similar statement was repeated in his dissenting opinion in Malone v. Bowdoin, 369 U.S. 643, 650 (1962).

[72] See, *e.g.*, Stanley v. Schwalby, 162 U.S. 255, 270 (1896): "The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. . . . The answer actually filed by the District Attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instruction of the Attorney General, and could not constitute a voluntary submission by the United States to the jurisdiction of the court."

As a matter of general policy the Department of Justice affords counsel and representation to federal employees when suits are brought against them in connection with the performance of their official duties.[73] The policy extends even to in personam actions that arise out of their official duties. A few cases, difficult to reconcile with the larger number to the contrary,[74] apply more usual notions of collateral estoppel in holding that the United States is bound by a judgment against its officers, when authorized legal representatives of the United States have represented the officer and controlled the defense.[75] With the partial elimination of sovereign immunity, these decisions will represent federal law. General principles of res judicata and finality support the proposition that the United States should be bound by a judgment when it has controlled the defense in a suit against the officer.[76] In the future it will appear natural and just if the United States is precluded under such circumstances and unconscionable if the United States is not bound.

IV. Conclusion

The remaining problems associated with the law of parties defendant are overdue for total elimination. The Department of Justice should take active steps to instruct its lawyers not to seek dismissal of cases seeking judicial review of federal administrative action on the basis of technical defects in parties defendant. Congress, by adopting the provisions indicated below, can make a substantial contribution to society through rationalizing a complex and intricate specialty of federal law.[77]

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[73] U.S. Dept. of Justice, Manual for United States Attorneys 4 (1962). See also D. Schwartz & S. Jacoby, Government Litigation—Cases and Notes 19–20 (1963).

[74] See cases cited in notes 71–72 *supra*.

[75] See, *e.g.*, United States v. Candelaria, 271 U.S. 432, 444 (1926), in which the Court held that the United States was estopped from asserting title to land claimed by an Indian pueblo if the United States had employed and paid a special attorney to litigate title on behalf of the pueblo in a prior suit. See also Drummond v. United States, 324 U.S. 316 (1944), in which the Court held that payment by the United States of the fee of an attorney who represented an Indian in land litigation did not bind the United States; the Court stated that in order to bind the United States "when it is not formally a party it must have a laboring oar in the controversy".

[76] See, *e.g.*, Souffront v. Compagnie des Sucreries, 217 U.S. 475, 486 (1910): "The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of its own, and who does this openly to the knowledge of the opposing party is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record."

[77] Language to be added is in italics; language to be deleted is blocked out.

UNITED STATES CODE

Title 5

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. *If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.* Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Title 28

§ 1391. Venue generally

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(e) A civil action in which *a* each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, *or the United States*, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. *Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure without regard to other venue requirements.*

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

RECOMMENDATION NO. 19

SEC NO-ACTION LETTERS UNDER SECTION 4 OF THE SECURITIES ACT OF 1933

The following recommendations concern the process by which the Division of Corporation Finance of the Securities and Exchange Commission (the "Division") advises stockholders whether proposed sales of unregistered stock might involve a violation of the Securities Act of 1933 for which the Division would recommend Commission enforcement action. This no-action process is an outstanding example of administrative accessibility and pragmatism, enabling stockholders readily to determine whether a contemplated sales transaction may be consummated without registration. The recommendations are intended to enable the public and individual stockholders to be more fully advised of the interpretations, policies and precedents which guide the conclusions of the Commission and the staff, and to encourage the Commission to relieve its staff of the burden of routine no-action requests.

RECOMMENDATION

1. *Rule-Making.* The Commission acting under 5 U.S.C. § 553, should to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process. Where generalized rules are not feasible, the Commission should consider making rules limited to illustrative cases (involving either real or hypothetical facts) with an explanation of the reasons for their disposition. Existing summaries of past no-action letters, minutes of the Commission's disposition of those no-action requests which are brought before it, and related memoranda, insofar as they reflect current interpretative positions, should afford a strong and readily available foundation for such rule-making.

2. *Interpretative Releases.* Where the formal rule-making recommended above may not be feasible, the Commission should to the maximum extent feasible make publicly available by the means of public releases its legal interpretations and policies, and standards guiding discretionary determinations.

3. *Past Interpretations.* On questions of law or policy which are not answered in formal rules or releases, a selected group

of the more important past no-action letters which may have continuing significance should be summarized and made publicly available.

4. *Routine Inquiries.* As the Commission's rules, releases and particular interpretations become publicly available, the Commission should consider instructing its staff to discontinue giving no-action letters on routine questions adequately answered by publicly available material.

5. *Future No-Action Letters.* The Commission and its staff should continue to issue no-action letters not excluded as routine under the limitation, suggested in No. 4. Each non-routine letter should, in detail or in summary form as deemed appropriate, state the facts and the reasons for the conclusion. Each letter should be made publicly available, subject to safeguards deemed appropriate under No. 6.

6. *Confidentiality and Time of Publication.* The Commission in making no-action letters publicly available should protect confidential information by the most effective and feasible means, including deletion, preparation of a "public" version of the letter, or reasonable delay in making the letter public. However, those letters which reflect significant developments in legal interpretation, policy or standards guiding discretion, should be published promptly, subject to the necessary protection of confidentiality.

7. *Procedural Regulations.* The present procedural regulations do not fully describe the no-action process and should be expanded to cover each step of the process.

Separate statement of Malcolm S. Mason

Government needs the art of making practical compromises between conflicting goals. There is a regrettable tendency to hold up administrative agencies to Olympian standards based on a theoretical pure strategy when a mixed strategy is called for. This operates to defeat the purpose of administrative procedure and the values to the public of administrative action. The Conference is hurrying too fast the process towards formalism which destroys both effectiveness and fairness. Every generation needs not only a measure of rational consistency but also the principle of Equity that stare decisis kills.

The Securities and Exchange Commission no-action letter is an outstanding creation in the field of administrative procedure by an agency that has been outstanding in its efforts to communicate its views to the public affected. The Conference believes that the Commission can do better and I agree it can, but the conference has proposed a solution which in my view makes sure that it will do worse.

The recommendation of the Conference if carried out will destroy the no-action letter for the valuable purpose for which it was created: quick helpful trustworthy guidance. If advice on particular matters must be accompanied by a public statement containing facts and reasons (as required by the Conference Recommendation, paragraph 5) and will be used as precedent, cautious statement and careful qualification is needed. The result will be that the staff will no longer dare to give the quick and informal advice and assurance that they are now authorized to give. The people who need the assistance will no longer get it. A new piece of bureaucratic red tape will be created. An existing effective and valuable informal procedure will be hurt. None of those who supported the recommendation intended this, but it will be the result. The Conference Recommendation does not reflect realistic consideration of how the no-action letter has operated in the past and how it will be likely to operate in the future.

REPORT OF THE COMMITTEE ON INFORMAL ACTION IN SUPPORT OF RECOMMENDATION NO. 19

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I. INTRODUCTION

This study examines the informal processes by which advisory opinions are rendered by the office of the Chief Counsel of the Division of Corporation Finance, Securities and Exchange Commission. The primary focus of study has been upon the processes by which that office renders "no-action letters": letters advising an applicant whether the staff would recommend Commission enforcement action if a sale of unregistered stock were to be made under the circumstances and in the manner proposed by the stockholder. That elliptical description is required to conform to the staff's view of the purpose of "no-action" letters; and the hypothetical phraseology is required because the process seldom involves any prospect of imminent enforcement action.

The range of inquiry is limited to the no-action process as it is administered in the Division of Corporation Finance. (Hereafter, "Division".) That Division was chosen as the focus of inquiry because of the significantly higher volume of advisory letters issued, as compared to the other Divisions of the SEC staff. Also dictating the choice was the estimate made by the Solicitor of the SEC, Mr. David Ferber, and the Division's Chief Counsel, Mr. Courtney Whitney, Jr., that approximately 80% of the no-action letters rendered by that Division deal primarily with the question whether one who receives unregistered stock may sell that stock without complying with the registration requirements of the Securities Act of 1933. (Hereafter, "1933 Act.") It was thought that concentration in a single substantive area would make possible a more thorough analysis of the extent of discretion exercised and the extent of consistency achieved. through extensive comparisons of cases representing specific types of transactions.

The supposition that concentration in this "single substantive area" would facilitate simple comparisons of representative cases was misconceived. Such a study would have involved an extensive "library" examination of the complexities of a large number of cases, to the exclusion of other types of inquiry. Even a study concentrating on one or two basic concepts would involve a detailed legal and factual analysis and comparison of complex transactions with many subleties that would have to be identified and compared. (See Appendix H, outlining the analytical factors necessary in an adequate study and comparison of similar cases; and see the discussion, *infra*, of discretionary factors which appear to have influenced decision.) Only such a study could fully demonstrate the degree to which discretionary factors influenced decision or the extent to which inconsistent application of standards affected staff advice. However, substantial sampling of cases and internal records, staff responses to a detailed questionnaire, and frequent discussions of specific cases with various members of the staff, together with the fortunate conjunction of this study with the extensive study of disclosure policy recently completed by the staff, provide an adequate basis for the judgments expressed here.

Because all divisions of the SEC staff render interpretive letters, it may seem somewhat artificial to have isolated that process as it is administered in only one division. Yet that process, as administered in the Division of Corporation Finance, is sufficiently distinct for independent study. The major portion of the advisory letters processed in that Division are not particularly "interpretive" in form and are not intended primarily to be informative about Commission or staff policies or interpretations. Rather, the letters are the instrument of a clearance process which authoritatively disposes of doubts about the right of a stockholder to sell his stock without registration. As a result, most specific, detailed questions concerning the application of the registration provisions of the 1933 Act are reduced to an answer to the practical question whether, on a given set of concrete facts, the staff would recommend enforcement action if the sale is consummated as proposed. Thus, the staff has stated that the letters prepared by this Division "rarely take the form of an interpretation as such." (See staff memorandum to Warner W. Gardner, Appendix E, p. 1.) In contrast, it appears that the letters generated by the Division of Corporate Regulation are substantially more interpretive—only 20% taking the form of "no-action letters." (*Ibid.*)

The form and content of the no-action letters, the volume of letters generated by the Division, and the rather routine nature of the bulk of the inquiries all indicate that these letters perform a distinct "clearance" or licensing function not generally understood to be the objective of agency advisory processes.

The staff reports that the Division generates no-action letters at a rate of approximately 5,000 per year, as compared to 640 per year in the Division of Corporate Regulation and 400 per year in the Division of Trading and Markets. (*Ibid.*) While it is possible to quibble about the exact number, it is clear that the letters are issued at a rate of substantially more than 4,000 per year and that considering and responding to requests for the letters consumes a significant part of the effort of the Division. Further, the large proportion of the requests which ask merely "When may I sell?" (without registration) present few interpretive problems of consequence for the development and elaboration of administrative policy. Thus, responses to the questionnaire submitted to staff attorneys indicated that most find their reservoir of experience adequate to prepare a letter in at least 70% of the cases. (See Appendix I, question 29.) That may suggest that most of the no-action letters can be handled with dispatch. But often the questions presented, though not of great interpretive difficulty, require discretionary judgments that call for careful and conscientious consideration. The former Chief Counsel of the Division has commented:

> [M]any members of the Bar and the securities industry have no idea of the volume of requests that are made for staff advice, or of the internal problems of administration that arise in providing this service. In particular, it is difficult for a person who has not had experience on the staff to appreciate the amount of time that must be devoted to answering even a routine request for staff advice. (Appendix B, pp. 5–6).

While a large proportion of the requests for no-action letters are of little or no interpretive significance, a significant number of them present important questions about established interpretations or policy which deserve extended consideration. Staff responses to those inquiries are prompt and thorough; but there is reason to doubt whether it is possible for the staff or the Commission to make optimum use of the unique interpretive opportunity offered by such requests so long as the no-action procedure is regarded as a clearance device for any stockholder who seeks to establish his right to sell. It would seem that only great solicitude for stockholders' needs for adequate legal advice, or a certainty that the system operates to encourage general compliance with the regulatory statutes, could justify this allocation of effort.

The burdens of the clearance function performed by the no-action process in the Division of Corporation Finance are also recognized by the study, "Disclosure to Investors" (hereafter, *Disclosure Study*), recently completed by a special SEC staff under the supervision of Commissioner Wheat. Although that study concentrated on the substantive rules controlling registration obligations, one of the important motivations for that study arose from the burdens of the no-action process. After explaining the interpretive problems that have rendered the substantive law uncertain, the study describes one important consequence of that uncertainty as follows:

> (2) The Commission's staff is faced with a growing burden in responding to requests for interpretive advice and "no action" letters centered around the question: "when may I sell?" In fact, a large majority of all such requests under the 1933 Act pertain to the resales following a private offering. It is important that this burden be reduced. To the extent that certainty can be provided, "no action" requests would become unnecessary. (Disclosure Study at 175.)

The *Disclosure Study* seeks to ameliorate the burdens of the no-action process by simplifying the substantive rules. The present study attempts to examine the process itself, concentrating upon the "efficiency, adequacy and fairness" of this advisory and clearance process.

There is obvious advantage in concentrating on processes in a substantive field that was recently put under searching examination by the agency staff, for it is possible to examine the processes in light of substantive staff conclusions that would otherwise require substantial independent study. On the other hand, there was some reason to wonder whether there would be undue duplication of effort and whether the substantive proposals of the *Disclosure Study* would render the product of this study useless. For a number of reasons, that is not the case:

1. The no-action letter process is an important example of an informal advisory process in which important private rights are disposed of by both staff and Agency determinations, often with the same effect as a final order. The process has developed with the encouragement of the Agency, follows a rather well-defined set of procedures, but is described in only the most sketchy of published regulations. (See 17 C.F.R. sections 202.1 and 202.2, appendix K *supra*.) Thus, even if new rules proposed by the *Disclosure Study* substantially reduce the interpretive prob-

lems and the concomitant need for staff advice, analysis of the no-action process should yield valuable insights into agency advisory processes; and those insights should be helpful in framing general recommendations to the Administrative Conference. Further analysis of this process should be helpful in any later comparison with other agencies' advisory processes.

2. New substantive rules will not eliminate the need for advisory processes, even in the applicable substantive field. Although the *Disclosure Study* predicts that its proposed rules will very substantially reduce the need for advice about questions that presently are in doubt, advice inevitably will be needed in defining the boundaries of the new rules.

3. It is doubtful that any rules the SEC could adopt will resolve the interpretive problems created by the broad language of the statute. For example, the *Disclosure Study* specifically recognizes that it leaves two fundamental concepts for continued administrative elaboration: (a) the distinction between a "public offering" and a "private offering" of securities; and (b) the concept of a stockholder's "control" over or "control relationship" with the issuer of securities. (The rules proposed by the *Disclosure Study* do, however, narrow the coverage of the "control" concept by employing a negative definition that utilizes four hypotheticals to exclude certain circumstances from a statutory "control" relationship.)

II. THE SUBSTANTATIVE CONTEXT FOR NO-ACTION LETTERS RENDERED BY THE DIVISION OF CORPORATION FINANCE

The objective of most of the no-action letters rendered by the Office of Chief Counsel, Division of Corporate Finance, is to advise stockholders whether they must register their stock in order to sell it without risking SEC enforcement action. Both oral and written advice on that problem are given by the Chief Counsel's office. Oral advice tends to be general and interpretive; it assists counsel in identifying specific problems, often with a view to a more specific application for a no-action letter. Written advice in most cases is specific and conclusory; it includes little or no interpretive material, but expresses the staff's conclusion whether, on a particular set of facts, it would recommend that the Commission take action if a stockholder should sell stock without registration.

The assurance provided by a no-action letter is treated as binding by the Commission, though the estoppel effect of such a letter has not been judicially determined. See Loss, *Securities Regu-*

lation, *pp.* 1843–44 (2nd Ed. 1961). (Such an assurance may also tend to discourage private actions for sales made without registration. However, because the no-action letter is founded upon carefully exacted factual representations, it is not regarded by enforcement personnel as a bar to investigations of unregistered sales until it is determined that the sale in question conformed to the factual representations.

In a few instances, the collateral effect of a no-action letter has had an impact upon private litigation: for example, in determining the obligations of a transfer agent to record shares in the name of the acquiring stockholder. See *Donlon Ventures, Inc.* v. *Arien, Inc.*, 158 N.Y.L.J. No. 5, p. 10, 1966–67 CCH Fed. Sec. L. Rep. paragraph 91,961 (July 10, 1967). And in a recent case the defendant's disregard of a staff letter declining to take a no-action position may have played a role in determining the wilfulness of his violation, according to a staff attorney in the Division of Trading and Markets. See *United States* v. *Wolfson*, 269 F. Supp. 621 (S.D.N.Y. 1967) and 282 F. Supp. 775 (S.D.N.Y. 1968).

The substantive problems resolved by the no-action process in the Division are basically concerned with two sides of the single question whether stock must be registered before sale:

(1) Whether the registration provisions are applicable to the applicant's proposed sale of stock; and

(2) Whether the applicant is relieved of the registration obligations by various exemptions created by statute and rule.

The basic purpose of the 1933 Act is to assure that public distributions of securities are accompanied by disclosure of all information material to a prospective stockholder's investment decision. The disclosure objectives are accomplished through the registration and prospectus delivery requirements of section 5 of that Act, which apply to any "sale" of a "security" (or offer to sell). Failure to comply with those requirements may subject the seller to the Commission's injunctive remedies under section 20 of the Act, the absolute liability to purchasers provided by section 12(1), and possible criminal remedies under section 24. In addition to those sanctions, a broker or dealer who participates in a sale of unregistered securities is subject to a range of sanctions provided by section 15(b)(5), Securities Exchange Act of 1934 (hereafter, "1934 Act"), including censure and denial, suspension or revocation of his status as a registered broker or dealer.

In order to exempt regular trading transactions by persons not involved in promoting the sale of a security, persons other than an "issuer, underwriter or dealer" are exempted by section 4(1) of the Act from the registration and prospectus requirements of section 5. A further exemption, also to protect ordinary trading transactions, is given to dealers, provided they are not participating in a general public distribution of the issuer's stock. Because a liberal application of these exemptions would defeat the disclosure objectives of the Act, the Commission and staff have sought to limit availability of the exemptions in order to reach public distributions of unregistered securities.

A primary means by which the Act reaches general public distributions of securities is by excluding an "underwriter" from the section 4 exemption and by broadly defining that term. Thus, one who falls within the statutory definition of "underwriter" must comply with the registration and prospectus requirements of the Act. "Underwriter" is defined, in section 2(11) of the 1933 Act, as follows:

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

The interpretation and application of the "underwriter" definition is the interpretive problem presented by the bulk of the requests for no-action letters received by the Division. Noting that the interpretive process has centered on the language "with a view to . . . distribution," the *Disclosure Study* comments:

> As a result of this process of interpretation, the Commission and those affected by the 1933 Act soon found themselves tied to a wholly subjective test by which to determine when a person is an "underwriter." Does the person who buys from the issuer or controlling stockholder have the "view" or "intent" of later reselling his securities to the public? How can his true "intention" be accurately determined? (*Disclosure Study* at 163.)

Although the *Disclosure Study* condemns the subjective quality of these tests and their accompanying uncertainty, it is clear that the main dimensions of the interpretive positions taken by the staff are supported by judicial interpretations of the sections in question. See generally, Jennings and Marsh, *Securities Regulation, Cases and Materials*, pp. 271–363 (Foundation Press, 2nd ed. 1968).

Typical circumstances presenting interpretive problems which give rise to no-action requests are set forth below. For a more detailed description of the interpretive uncertainties that arise from the subjective tests traditionally applied, see *Disclosure Study*, at pages 164–177.

1. X Company issues a noncontrolling block of its stock to A, a director and controlling shareholder, relying on the exemption from registration provided by section 4(2) for private sales that do not involve a "public offering." A holds the stock for 6 months and now seeks to sell it through a broker in the over-the-counter market. If A sells, the staff will ordinarily conclude that he earlier purchased the security from his company (the "issuer") "with a view to . . . distribution" of the security, or that he is "selling for" the issuer "in connection with" a distribution. Under either construction, A would be regarded as an "underwriter" who must comply with the registration requirements before selling his stock.

The original sale by X Company to A may also be subject to challenge on the ground that A's conduct demonstrates that his purchase contemplated a "public offering," thus compromising the original claim of a private offering exemption. The determinative question—one of "fact" in the staff's view—is whether A's intent, at the time he took the stock, was to hold for investment or to distribute the stock. Even though A, at the issuer's insistence, may have executed a letter reciting his "investment intent" at the time he took the stock, the staff may conclude that the later sale is a more reliable index of A's state of mind. Hence, the staff would deny a request for a "no-action" letter.

Finally, A's control relationship, though suggesting a motive to distribute on behalf of his company, is not essential to the above-described application of the Act. Thus, a noncontrolling shareholder who acquired a noncontrolling block of shares in similar circumstances may also be viewed as having acquired the shares with the forbidden intent or "view to . . . distribution;" and a large number of no-action letters present just such circumstances.

2. A, in the above example, makes a further "private offering" of a noncontrolling block of X Company stock to a friend, B, who owns no other shares in X Company. B buys the stock with a representation of his investment intent, holds the stock for 6

months and then seeks to sell through a broker in the over-the-counter market. Section 2(11) provides (only for purposes of that definition of "underwriter") that an "issuer" includes one in a "control" relationship with the issuer. Hence, A, a controlling shareholder of X Company, is an "issuer" and B is an "underwriter" if he bought from A "with a view to . . . distribution" rather than investment. Again, the determinative "fact" is B's state of mind at the time of his purchase from A. If he should request a no-action letter, the staff would conclude that his sale after holding only six months demonstrates that he did not have sufficient investment intent at the time of his purchase. But if B suffers a severe financial setback that was not foreseeable at the time of purchase, that "change of circumstances" may support the inference that he bought for investment, despite his present desire to sell.

3. In example (1), a broker who executes a sale of A's stock will want to determine whether A is a "controlling person" of X Corporation, and hence an "issuer" under the underwriter definition. If A is a "controlling person", then the broker will be "selling for" an "issuer" and, under the definition, will be an "underwriter." The staff considers the question of control to be one of "fact" which must be determined by an analysis of all the circumstances and relationships between the person in question and the company and other controlling persons.

4. In examples (1) and (2), a broker who executes sales of stock for A or B will want to know whether either is an "underwriter": whether B took from A "with a view to distribution," or whether A took from the issuer with such intent. If that is the case, then, under section 2(11), the broker may also be an "underwriter" if he "participates or has a direct or indirect participation in" a sale by one who is a statutory underwriter. To avoid a charge (under section 15(b)(5)(D) or (E) of the 1934 Act) of willful violation of the Act and the accompanying possibility of disciplinary action, he should conscientiously investigate any facts which suggest that his seller occupies such an "underwriter" status.

5. In all examples, it is possible that the seller or broker might also want to determine whether the proposed sale constitutes a "distribution" of the X Company stock. The statute defining "underwriter" imposes that status only where there is a "view to . . . *distribution*" or where a transaction is consummated "in connection with . . . the *distribution*" of a security. (Emphasis added.) While a narrowing interpretation of the term "distri-

bution" might have provided some relief, that term "has always been regarded by the Commission as essentially synonymous with public offering." (*Disclosure Study* at 161–62.)

In defining the narrow statutory exemption for "brokers' transactions" (Section 4(4)) on behalf of controlling persons, the Commission has by rule defined a "distribution" to exclude "transactions involving an amount not substantial in relation to the number of shares or units of the security outstanding and the aggregate volume of trading in such security." (Rule 154.) The rule permits brokers' sales (for controlling persons) within certain quantitive limitations by excluding such sales from the definition of the term "distribution"; but that use of the term is applicable only for purposes of the exemption for "brokers' transactions." (Section 4(4) of the 1933 Act.) Thus, the broad statutory concept of "distribution," embracing any public sale, would be applicable to the term as it is used in the "underwriter" definition. And sales by a controlling person of stock privately acquired from the issuer, unless otherwise exempt, would involve a "distribution," rendering both the seller and the broker statutory "underwriters."

6. Although one who sells for an issuing company or for a person controlling the issuer ordinarily falls within the statutory definition of "underwriter," he may claim exemption under section 4(2) of the 1933 Act, which exempts "transactions by an issuer not involving any public offering." In accordance with *United States* v. *Ralston Purina Co.*, 346 U.S. 119 (1952), the fundamental test that determines availability of the exemption is whether the offeror's relationship to the offerees in the private transaction is such that the latter "need . . . the protections afforded by registration." (346 U.S. at 127.) But like the other interpretive problems described above, the question whether a transaction involves a public offering is viewed as "essentially a question of fact." And that fact question "necessitates a consideration of all surrounding circumstances, including such factors as the relationship between the offerees and the issuer, the nature, scope, size, type and manner of the offering." (Securities Act Release No. 4552, Nov. 6, 1962.)

III. Source of the Demand for No-Action Letters: Identity and Objectives of Applicants

The heavy demand for staff advice in the form of no-action letters, reflected in the volume of letters generated by the Division, makes it particularly important to attempt to uncover the source of that demand. No general survey has been conducted among applicants to determine the motivations which prompt their requests; but inquiry and hypotheses suggest probable answers.

In form, virtually all applications for staff advice are submitted by a holder of stock who seeks to sell without registration, or by his counsel. Because of the costs and delays incident to registration, and in view of the elusive and subjective determinations of "ultimate fact" involved in deciding whether registration is required, it is understandable that staff advice might be sought. Yet very nearly 40% of the letters appear to be requested by nonlawyer stockholders, who ordinarily would be unaware of the legal restrictions on stock distributions and of the no-action process. The remainder originates with counsel, who should be accustomed to making similar kinds of determinations of "ultimate fact," without agency assistance, in advising clients about proposed transactions.

Requests for no-action letters also are submitted in the face of some substantial reasons for avoiding that process. Staff responses to requests for a no-action position are not sufficiently favorable to encourage submission of requests, particularly where the availability of an exemption from registration is doubtful:

> [The big practical limitation upon the utility of "no-action" requests is the difficulty of getting a reply from the Commission. The sad truth seems to be that you get "no-action" letters in the clear cases but have an awful time getting them—or don't even ask—in the cases where you really need them. (Israels, ed., S.E.C. Problems of Controlling Stockholders and Underwriters (P.L.I. 1962), page 19; comments of Mr. Gilroy.)

Analysis of no-action letters for two half-month periods in 1969, reflecting a total of 351 letters, demonstrated a rate of favorable response of approximately 60%. In view of the well-understood hazards involved in drawing regulatory attention to a proposed transaction, that rate of success could hardly be viewed as an inducement to submit no-action requests. Furthermore, though the usual delay in staff response to no-action requests is not excessive, the delay is undoubtedly substantial from the viewpoint of applicants anxious to realize on their assets or to take advantage of a favorable market opportunity. Carlos L. Israels, in his "Checklist" for assuring broker-dealers' compliance with restrictions on the sale of unregistered securities, comments: " 'No action letter'—procedure available—but time consuming and does not protect against civil liability." (A.B.A., Selected Articles on Federal Securities Law, p. 79 (1968).)

The foregoing considerations suggest that it is not merely the generous availability of staff responses to no-action requests that produces the increasing demand for them. Rather, it seems that a combination of factors has produced that demand, including: (1) Issuers' fears of civil liability to purchasers under section 12(1) of the 1933 Act; (2) Broker-dealers' fears of disciplinary proceedings brought against them on account of sales of unregistered securities; (3) The enforcement practices of the Commission and staff; and (4) The unreliability of counsel's advice as an assurance against disciplinary proceedings.

Technically, the absolute liability imposed by section 12 (1) of the 1933 Act on anyone who, without registration, "offers or sells a security" would not appear to pose a threat to the issuing company, for the violation emanates from a further sale by the recipient of the earlier private placement. On further consideration, however, several very real threats to the issuer arise:

> (1) The Commission may commence a formal investigation or bring injunctive proceedings to stop trading in the company's stock, with serious consequences in the securities market;
>
> (2) The ultimate purchaser may claim extensive civil liabilities on the theory that the sale was made to him as part of a distribution on behalf of the issuer—a claim that is encouraged by the statutory definition of an underwriter as one who "sells for" the issuer;
>
> (3) The latter threat is enhanced by the prospect that the issuer may be required to show the potential liability on its balance sheet as a contingent claim;
>
> (4) Though it is more doubtful, it is possible that the original recipient of the private placement, if held liable to a later purchaser, will be able, in turn, to recover against the issuer because of the absolute liability imposed by section 12(1).

For all of these reasons, it has been traditional for the issuer in a private sale to require an investment commitment from the purchaser to protect against a later sale which may destroy the private offering exemption. And because judicial and administrative construction have increased that probability, issuing companies are commonly advised to stamp an investment restriction on the face of the stock certificates issued in a private placement and to issue "stop transfer" orders to the transfer agent, requiring notice to company counsel if the restricted shares should be presented for transfer to a later purchaser. (See Israels, "Some Commercial Overtones of Private Placement," A.B.A., *Selected Articles on Federal Securities Law*, 125, 129–30, 135–43 (1968); and Wood, "The Investment-Intent Dilemma In Secondary Transactions," *Id.* at 145, 169–70.)

Similar threats of liability and disciplinary proceedings confront a broker-dealer who executes a sale found to have been made without exemption and thus in violation of registration and prospectus requirements. Division personnel uniformly agree that a large proportion of no-action requests originate with broker-dealers.

Even before the 1964 Securities Act Amendments, the Commission's exercise of its power over registration of broker-dealers had impressed upon them their vulnerability to sanctions for participating in distributions of securities acquired through private placements. (See, e.g., *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F.2d 461 (2nd Cir. 1959); and list of revocation proceedings, 26th *Annual Report, Securities and Exchange Commission* 92–106 (1960).) And in SEC Release 4445 (1962), the Commission indicated that dealers would be held personally responsible for investigating the underlying facts supporting stockholders' claims of exemption, and that they are obliged "to make an appropriate investigation as to who their seller was not simply to rely upon the opinion of the seller's attorney that no control relationship existed."

The 1964 Securities Acts Amendments significantly expanded the disciplinary powers of the SEC, giving it power to proceed against individual registered representatives as well as against broker-dealer firms, to impose a wider range of sanctions including censure and suspension, and to prohibit association of named violators with any broker-dealers. (See generally, Greene, "Regulation of Entry Into The Securities Business," A.B.A., *Selected Article on Federal Securities Law* 487 (1968); and Sterling, "National Association of Securities Dealers and the Securities Act Amendments of 1964," *Id.* at 495.) In addition to seeking revocation or suspension of registration of broker-dealer firms, the Commission has enhanced the effect of such proceedings by substantial application of its new statutory power to proceed against individuals, bringing proceedings against a total of 387 individuals in the fiscal years 1966 through 1968. 32nd Annual Report, SEC, p. 58 (1966); 33rd Annual Report, SEC, p. 77 (1967); 34 Annual Report, SEC, p. 90 (1968).

Most broker-dealer firms that are members of a registered exchange or of the National Association of Securities Dealers have established supervisory procedures designed to minimize the risk of violations by their registered representatives. The procedures tend to focus upon a wide range of financial standards and rules designed to promote "just and equitable principles of trade;" but if carefully followed, they would generally bring questionable transactions in "restricted" securities to the attention of supervising officers. It seems more doubtful whether ordinary supervisory procedures effectively control distributions of securities not stamped with an investment restriction; but some firms have established compliance procedures under a supervising officer designed to focus specifically on compliance with federal securities acts.

Although the formal training of representatives in matters of federal securities law is limited, the lore of the securities business supplements the formal supervisory structure. Both SEC enforcement personnel and representatives of the National Association of Securities Dealers indicate that the availability of the no-action process to clear "investment stock" is well understood by most representatives. And it seems likely that the lore of "no-action" letters is substantially contributed to by typical investigative practices. Though a no-action letter does not assure immunity investigations are more likely to focus upon those transactions in which a no-action letter does not appear in the file. Where an investigator from a regional office is analyzing a large, questionable distribution, he is likely to inquire why a no-action letter was not obtained to support the transaction.

All of these factors have undoubtedly begun to result in a closer control of unregistered distributions in most broker-dealer firms; and firms' supervisory or compliance officers are much more likely to insist upon either a no-action letter or the opinion of reliable counsel demonstrating the availability of an exemption from registration. However, the broker-dealers to whom a proposed sale of "investment stock" is presented are not particularly encouraged to have confidence in the opinion of private counsel. The Commission's comments in Release 4445 (1962) suggest the unreliability of attorneys' opinions as the basis for a claimed exemption authorizing trading in unregistered securities:

> In *United States v. Crosby* [294 F.2d 928 (2d Cir. 1961)] the court found persuasive the contention of defendant dealers that, in selling large blocks of unregistered stock of Texas-Adams Oil Co., Inc., in reliance on a legal opinion based upon incomplete facts, they were "doing business as usual" and, to their best knowledge, according to acceptable standards. The court perhaps found this argument persuasive in the con-

> text of that criminal conspiracy trial, since no evidence to the contrary was before it. The experience of the Commission, however, clearly demonstrates that the conduct of these dealers did not meet acceptable standards. . . . It was up to these dealers to make an appropriate investigation as to who their seller was and not simply to rely upon the opinion of the seller's attorney that no control relationship existed.
>
> There have been a number of cases in which dealers have unsuccessfully sought to justify a claim to exemption under section 4(1) of the Securities Act simply by securing from the sellers, actual or ostensible, representations that such persons are neither officers, directors, nor large stockholders of the issuer, and submitting such representations to an attorney who then gives an opinion to the effect that, assuming the correctness of such representations, exemption under section 4(1) is available. Obviously, an attorney's opinion based upon hypothetical facts is worthless if the facts are not as specified, or if unspecified but vital facts are not considered. Because of this, it is the practice of responsible counsel not to furnish an opinion concerning the availability of an exemption from registration under the Securities Act for a contemplated distribution unless such counsel have themselves carefully examined all of the relevant circumstances and satisfied themselves, to the extent possible, that the contemplated transaction is, in fact, not a part of an unlawful distribution. Indeed, if an attorney furnishes an opinion based solely upon hypothetical facts which he has made no effort to verify, and if he knows that his opinion will be relied upon as the basis for a substantial distribution of unregistered securities, a serious question arises as to the propriety of his professional conduct.

Responsible counsel may legitimately feel some trepidation in rendering opinions, based on conclusions of "ultimate fact" and involving such extensive potential liability. Until recently, relatively few lawyers had studied or had experience with federal securities regulation. While a general understanding of the regulatory theory described, *supra*, is available from traditional sources, they contain very little reflecting the concrete application of doctrine. To a limited extent, examples of concrete applications of doctrine are available through private arrangements among SEC practitioners for the exchange and compilation of no-action letters as they are received. But those compilations are not generally accessible to the practitioners most in need of guidance. And this condition prevails in an area of law in which the *Disclosure Study*, after analyzing the substantive inconsistencies, concluded:

> In the area of statutory interpretation which is primarily involved, uncertainty and divergence of practice presently prevail to an unacceptable degree. Greater certainty and predictability are essential. (*Disclosure Study* at 152.)
>
> Apart from the mere bulk of requests currently faced by the staff, there is a constant problem in providing reasonably consistent advice.

> Since the tests with which the staff must work are subjective, its reactions in given situations depend, to a degree at least, on a "feel" of the transaction conveyed by the request for "no action". Troublesome inconsistency is often the result. Yet that inconsistency, which exists within relatively compact staff operating under a single director, pales in comparison with the inconsistency in advice given by private counsel as to when and under what circumstances securities sold in private offerings may be resold.
>
> Any lawyer who has practiced in the securities field can recall instances in which several able counselors, viewing an identical set of facts, all reached differing conclusions. An overly conservative counsel may block a transfer of securities which other counsel would consider perfectly within the law, or (on occasion) an issuer of securities may advance a particularly rigid view of the law in order to prevent a transfer of securities from occuring which it does not wish to see occur for other reasons. Practical problems of this sort are not infrequent. (*Disclosure Study* at 176–77.)

In summary, private offerings have become increasingly popular as a means by which a company may acquire additional capital or compensate employees without undertaking the expense of registration. However, because of the potential liabilities to subsequent purchasers that may result from the sale of the unregistered stock by the immediate purchaser, the practice of stamping an investment restriction on the face of the stock certificate has increasingly been followed. That investment restriction may appear to the immediate purchaser to be a legalistic formality until he attempts to arrange for the sale of his stock through a broker-dealer. Because of the increasing frequency of Commission disciplinary and enforcement proceedings against broker-dealers, they are sensitized to the danger of selling unregistered "investment stock." When the prospective sale is brought to the attention of a supervising manager of the securities firm, he will ordinarily refuse to allow any sale to be executed until he receives a satisfactory opinion of counsel that a valid statutory exemption is available. Because of the understanding that many counsel will provide any opinion necessary to facilitate clients' sales, and because of Commission warnings that the opinion of private counsel will not necessarily insulate against disciplinary proceedings, many broker-dealers will insist upon a no-action letter unless the stockholder presents an opinion by counsel regarded as reliable. Further, it is a matter of general lore among broker-dealers and registered representatives that the safe thing to do, in any doubtful case, is to insist upon a no-action letter. And the investigation and enforcement practices of the Commission staff substantially contribute to that lore, for experience suggests to dealers that in routine investigations much less question is raised about transactions for which a no-action letter appears in the file.

Finally, where counsel is asked to render an opinion on the kind of "ultimate fact" questions involved in determining the availability of an exemption, he may well conclude that the uncertainty of the interpretive rules, or the unavailability of a sufficient number of concrete applications, renders it advisable to take advantage of the no-action procedure rather than risking an independent opinion.

These sources of demand for no-action letters suggest some doubt about whether the demand will diminish. Private offerings continue to produce a very substantial share of the total estimated gross proceeds from new securities offered. (See generally, "Estimated Gross Proceeds from New Securities Offered for Cash in the United States," published monthly in Securities and Exchange Commission, *Statistical Bulletin.*) Undoubtedly, the rules proposed by the *Disclosure Study* will reduce the uncertainty that prompts many no-action requests. But because the proposed rules are in some respects more rigidly restrictive, particularly with respect to unregistered sales of stock in nonreporting companies, it seems possible that many transactions that are now executed without notice will be more clearly identified as doubtful transactions. This, in turn, may produce additional requests for no-action letters, particularly for proposed "private transactions," which are not redefined by the proposed rules. Perhaps this depends upon what proportion of the existing volume of private transactions are traceable to nonreporting companies.

Other factors may also produce additional demand for no-action letters. A more successful training program for registered representatives may be developed by the NASD, making representatives more aware of doubtful transactions, particularly if the *Disclosure Study* rules are adopted by the Commission. The expansion of Securities Regulation courses in the law schools, and the continuing expansion of practice in that field by inexperienced lawyers, both may add to the flow of requests for no-action letters. Continued aggressive enforcement and continuing doubt about the protection furnished by opinions of counsel will continue to induce broker-dealers to seek the security of a no-action letter where questions arise.

For these reasons, it may be desirable for the Commission, as well as other agencies, in structuring their advisory processes, to further consider the impact of enforcement practices, the role of private counsel, and the possibility of avoiding routine "clearances" in order to give more extensive consideration to questions which advance their policy and technical thought, with broader public availability and fuller exposition of the grounds for their conclusions.

ORGANIZATION OF THE NO-ACTION PROCESS; CHANNELING OF REQUEST, RESPONDING LETTERS AND STAFF REVIEW

The no-action process is administered through the Office of the Chief Counsel, Division of Corporation Finance as a distinct facet of the organization of that Division. The Chief Counsel is assisted in administering the process by two Assistant Chief Counsel (hereafter, "Assistant"), who devote at least 75% of their time to the process. They, in turn, are assisted by approximately 40 staff attorneys from the various sections of the Division who, on the average, devote slightly more than 15% of their time to the process. Two or three special counsel in the office of the Chief Counsel also assist in the process on special assignments from the Chief Counsel or his Assistants.

The Division is organized into 15 branches for the primary purpose of processing 1933 Act registration statements and letters of comment and 1934 Act reports and proxy materials. Each branch of the Division bears responsibility for processing these materials for an assigned group of companies, with new companies being assigned to the branches on a rotating basis. The branch chiefs are responsible to the Director of the Division for branch performance of these duties.

The no-action process administered by the Chief Counsel's office cuts vertically through this organizational structure: the staff attorneys in the various branches are directly responsible to the Chief Counsel's office for their performance. Assignments to prepare responses to requests for no-action letters are made to the staff attorneys by the senior Assistant through the branch chief or the senior attorney in the branch, who attempts to balance the work load.

All requests for advice respecting the need to register stock to be offered for sale, as well as other requests for information, are channeled from the branches to the Chief Counsel's office. (Exception: occasional calls received by a branch attorney who has previously dealt with a party or his attorney.) Verbal requests are generally handled as abstract interpretive questions, with only general guidelines stated. Conversations looking to submission of a no-action letter may become more specific in identifying key issues, but, as a rule, no concrete conclusions *approving* a course of action are expressed orally. Where the advice sought involves a request for approval of a specific course of action, the parties are asked to submit a written statement of all of the pertinent facts and request a no-action letter.

All written requests for a no-action letter are initially channeled through the senior Assistant, who makes a rough appraisal of the problems it presents and assigns it to a branch. (He may occasionally retain a particularly difficult problem or assign it to one of the special counsel in the Chief Counsel's office.) The letters are assigned to the various branches according to the name of the company whose stock is to be offered for sale: the branch which has previously dealt with a company in connection with a prior registration (or other) matter will be assigned the no-action letters involving that company's stock. Where new companies are involved, the letters are assigned to the branches on a rotating basis.

After the branch chief or senior branch attorney assigns a staff attorney to the problem, the staff attorney would ordinarily proceed as follows:

(1) Analyze the apparent problems presented by the request.

(2) Write (or occasionally call) to ask for a further statement of facts if essential facts are missing.

(3) Conduct a file search to determine:

(a) Whether the Company has filed a registration statement with the Commission.

(b) Whether the Company is registered under the Securities and Exchange Act of 1934 and is currently rendering reports to the Commission pursuant to that Act.

(c) Whether the files indicate any securities violations by the Companies or individual involved, and if so, whether those violations are current.

(d) The current price at which the stock is trading.

(e) Whether the essential facts stated in the requesting letter comport with information about the Company on file with the Commission. (This search generally will involve a rudimentary examination of the amount of stock issued and outstanding, the relationship of "control" persons, and a quick search of the general correspondence file on each company. If possible inconsistencies with the facts stated in the requesting letter appear, a more thorough search will be conducted.)

(4) Do necessary research, if any.

(5) Prepare a recommended response and submit it to the Assistant, together with the requesting letter and a form reflecting the information obtained in the file search.

(6) In a very few cases the branch attorney may be asked to prepare a memo explaining the reason for his conclusion.

The recommended response, as submitted by the branch attorney, is then reviewed by one of the Assistants who signs the letter (under his title) if he finds it satisfactory. In a large proportion of the cases, however, the Assistant revises the recommended letter, often (30–40% of cases) reversing the conclusion recommended by the staff attorney. (See later discussion of reversals.) In another 10–20% of the cases, he may revise the form or content of the letter. Where the conclusion is reversed, the practices of the two Assistants diverge: unless the reason for the staff attorney's different conclusion is readily apparent (and reasonable), one Assistant discusses the matter with the staff attorney and explains the reason for his different conclusion; the other seldom discusses the change. In every case, however, the staff attorney is notified of the final result by receiving a copy of the responding letter in the form in which it was sent.

Where a no-action request presents a particularly difficult or unusual problem, the Assistants may discuss the matter with the Chief Counsel or Director of the Division before rendering their final determination. In some of those cases, or where the matter has been extensively discussed between the Chief Counsel and counsel for the stockholder, the Chief Counsel may sign or prepare and sign the letter. He also prepares some letters from time to time on a regular basis, though the total number handled by the Chief Counsel is small. He estimates that a relatively small proportion of his time (not more than 10–15%) is devoted to the no-action process. His predecessor, however, has estimated that he spent closer to half of his time on no-action matters. The disparity is probably explained by a recent Commission change of procedures, designed to minimize the number of no-action matters brought up for Commission consideration.

The no-action process appears to be administered on a substantially current basis. Relatively few cases involving significant delay came to my attention; and where delay occurred, it often resulted from requests that the applicant supply more factual data. A random sampling of the letters issued in 1969 indicated that approximately 50% of the affirmative responses and 70% of the negative responses had been pending for approximately one month or less; 30% of the affirmative responses and 20% of the negative responses had been pending for approximately two months; and an additional 20% of the affirmative responses and 10% of the negative responses had been pending longer than two months. Most of those pending more than two months had involved some additional correspondence intervening between the request and the concluding response.

The relative currency of the process is undoubtedly due to an effective check-off process maintained by the senior Assistant. He keeps track of every assignment of a no-action matter to a staff attorney and prods those who are slow in responding. While this presents some problem because the staff attorneys are primarily responsible to their branch chiefs, the system seems to be operating satisfactorily.

V. Initiation of the Process: The Parties and the Form of Advice Sought

A. *The Parties*

As indicated, the applicant for a no-action letter is generally a stockholder who seeks to sell his stock without registration. In some instances, the applicant may be a promoter of a new company, seeking exemption for an initial issue, or a promoter of a merger, seeking assurance that the merged company's stockholders may receive or dispose of the surviving company's unregistered stock. And occasionally, a pledgee seeks to realize upon pledged stock by obtaining a no-action position authorizing sale. But though many other parties, such as broker-dealers, may be interested in particular transactions, it is not the practice for interested parties to intervene; and in view of the substantive questions usually at issue, it seems doubtful that intervention would serve any purpose.

There are, however, some circumstances where the interests of third parties appear to affect staff or Commission judgments. For example, in one instance the Commission appeared to take into account the fear of administration officials that denial of an exemption and the resultant closing of the applicant's plant (for lack of funds) would produce unemployment in an already depressed area.

While such informal intervention on behalf of applicants by administration officials appears to be rare, intervention by members of Congress is much more common. For example, a spot check showed responses to nine inquiries from Congressmen during the period of April 1–18, 1969. (During the same period, 218 no-action letters were sent.) Almost invariably, such an inquiry results in preparation of a memorandum for submission to the Congressman, explaining the circumstances, the status of the no-action request, and the basic statutory theory supporting the staff or Commission disposition of the matter. (See discussion, *supra*, of the lack of apparent effect of intervention by Congressmen.)

B. *The Form of Advice Sought*

1. Oral Advice—Most questions relating to registration obligations are directed to the Chief Counsel's office in the Division, and that office responds to 75–100 telephone calls per week, most of which involve a request for interpretive advice. The Chief Counsel and his Assistants give considerable oral advice about interpretive problems presented by particular transactions; but most such advice is designed to identify specific problems which are left for ultimate resolution by counsel. The staff generally will not express specific conclusions about the legal consequences of specific courses of action without a written request detailing all pertinent facts. Where the parties seek ultimate conclusions about the application of interpretive concepts to particular facts, particularly where inquiries relate to the "underwriter" problems that dominate the no-action process, the parties will be urged to submit a written request for a no-action letter. In such cases, oral advice will be directed to explaining the kinds of facts that may be helpful in submitting a no-action request.

At an earlier date, many no-action matters were handled by a conference at which the applicant's attorney appeared, bearing the form of no-action letter for which he sought staff approval. The issues presented were debated and often resolved in personal conferences, with the letter issuing immediately. Such conferences now play a considerably less significant role in the no-action process; and the responding letter is no longer negotiated and executed in the course of the conference. Personal conferences do, however, continue to provide an effective forum for advocacy on behalf of a particular application, with some apparent effect upon the outcome in some cases.

There is no prescribed procedure for recording telephone or personal conferences. Some attorneys maintain a log of calls while most apparently do not. Where the information provided is material, notes are inserted in the correspondance file and generally referred to in the responding letter as the basis for the factual recitation.

2. *Written Advice*—The bulk of letters processed in the Office of Chief Counsel of the Division are no-action letters. A sampling of 322 letters issued in the period April 1–18, 1969, revealed that 218 were no-action letters, 97 were for general administrative or informational purposes (not interpretive), and only seven contained significant elements of interpretive content. All of the seven letters involved interpretive explanations of specific, generally complex, technical problems. However, few such letters contained advice on specific applications of the interpretive advice rendered.

Thus, substantially all of the advisory letters issued by the Division are no-action rather than interpretive letters, in the sense that they merely recite facts and state conclusions respecting the obligation to register stock, rather than overtly explaining the basis for the conclusions.

As might be expected, in view of the clearance function performed by no-action letters, the vast bulk of letters received by the Chief Counsel's office specifically request a responding no-action letter. As should be expected, there is also a significant burden of informational and administrative correspondence originating in the Chief Counsel's office.

VI. PROCESSING NO-ACTION LETTERS

A. *Defining the Questions to be Answered*

The no-action process does not provide any routine method for assuring that applicants understand the factual and legal questions that may determine the result of their request. Generally the written requests for no-action letters do not pose the specific questions to be answered, but merely recite facts relating to the amount of stock held, the source, date and price of the acquisition, and the extent of other holdings in the same stock, with source, date and price of those acquisitions. Questionnaire responses indicate that the no-action requests expressly state the determinative legal or interpretive question in about 35% of the applications. When the applicant identifies the question, however, he is correct (in the staff attorney's view) in about 80% of the cases. (Questionnaire, appendix I, question 13.)

Where a request for a no-action letter provides insufficient information, the staff attorney ordinarily will respond with a written request for additional facts. That inquiry, however, seldom expressly identifies the questions considered to be at issue. (And in a large number of routine requests, of course, the questions merely seek to establish the source of acquisition, the length of the holding period and the reason for the present desire to sell.)

More often, a telephone inquiry by the staff attorney or a status inquiry by the applicant may result in a telephone or personal conversation which identifies the key issues. But staff attorneys estimate that in more than half of the cases there is no communication with the applicant that specifically identifies the determinative question. (Questionnaire, appendix I, questions 15 and 16.) In most of those cases, however, the nature of the inquiry is undoubtedly so routine that the staff assumes that the determinative issue is understood. And in many of those cases the staff's reasoning is apparent from its comment that it is unable to grant the request "in view of the short holding period."

The more sophisticated SEC practitioners, on occasion, will provide a full statement of facts, followed by a statement of their interpretive reasoning in support of the opinion which they propose to give their clients, and concluding with a request that the Division indicate its concurrence. However, it is not apparent that the staff conclusions turn on the form of application. And some staff attorneys suggest that counsel may often want to avoid committing themselves to a single rationale, or may hesitate to focus attention upon a particular problem.

Although the power to deny a no-action letter would seem to give the staff substantial power to compel modification of proposed transactions, it does not appear that the power is used extensively. Where discussion initiated by the applicant or his counsel focuses on available alternatives, staff attorneys may occasionally suggest specific modifications of a transaction. And in a few instances the Commission has suggested that a specific limiting commitment would enable it to authorize a no-action position. Ordinarily, however, where revisions are made to assure favorable treatment, the suggestion is offered by counsel for the applicant.

While discretionary factors may often play a substantial role in the staff and Commission decision, few applications address any argument to such matters. Sophisticated SEC practitioners will occasionally point out that the small volume of the proposed transaction assures that the market will not be affected by the sale and that no special commission inducements will be necessary. And the relative insignificance of the holdings involved, compared to the total stock outstanding, will often be pointed out. But factors such as the difficulty of obtaining the issuer's agreement to register, or the pendency of enforcement proceedings and the applicant's relation to those proceedings, are seldom mentioned in the applicant's letter.

B. *Establishing the Facts*

No-action advice is usually given hypothetically, in the sense that the staff does not purport to determine questions of evidentiary fact. However, the staff insists that it will not give no-action advice without a full statement, from the applicant, of the facts material to the transaction in question. The letters essentially treat those statements as affidavits, scrupulously referring to or incorporating the factual assertions in the applicant's letter. But, with minor exceptions, no proof is required of the facts asserted by the applicant. This would seem to conflict with the Commission's own assertion in Release 4445 that a "serious question" concerning the propriety of an attorney's conduct would arise if he "furnishes an opinion based solely upon hypothetical facts which he has made no effort to verify," knowing that his opinion will be relied upon to support distribution of unregistered securities. It does appear that some of the asserted facts are verified against information available in the Commission's files. Ordinarily, however, those files would not provide means of verifying the transaction by which the shares were acquired unless they were acquired directly from the issuer. And even that information may be unavailable with respect to nonreporting companies.

It is estimated by the senior assistant that the facts initially provided by the applicant are inadequate in about 30% of the cases. In all but about 10% of the cases the missing facts can be supplied from Commission files in the course of a routine check of the issuer's file. Questionnaire responses suggest that it may be necessary to obtain additional facts from the applicant in 20–25% of the cases. (Questionnaire, appendix I, question 10.) But in only a negligible number of cases are the facts asserted by the applicant materially inconsistent with facts found in the routine check of the issuer's file.

Though the staff seldom requires substantiation of factual assertions, it may make routine inquires where the applicant has not supplied sufficient information about the source or period of his holdings. And submission of an unaudited statement of the applicant's financial position, both currently and at the time that he acquired the stock in question, is frequently required. But in exceptional cases, the staff may require some further substantiation of the applicant's assertions. For example, an applicant who claims that a medical problem created a serious change of financial position may be asked to submit a doctor's certification. In other instances, applicants have been required to furnish a cancelled check to demonstrate the date of purchase of the stock in question; or to furnish a copy of an employment contract on which a claimed "change of circumstances" is based.

C. *Research*

The available research tools, in addition to those publicly available, include the following internal sources:

(a) A monthly summary of interpretations which recites the basic facts and reasoning of the more significant no-action matters passed on each month by the staff. The summary does not include the text of the related letter, but contains considerably more explanation of the grounds for the result than do the no-action letters.

(b) A large card file containing the same summaries of interpretations, in which the cumulative production of the monthly summaries is filed. The cards are indexed by subject heading and by statutory section, and are cross-referenced to the significant questions involved in each case summarized.

(c) A file of legal memos on selected problem areas is maintained in a file alongside the card file. Relatively few memos have been added to that file in recent times.

(d) "The Bible": An analytical treatise prepared for use and maintenance in the office of the Chief Counsel which analyzes the construction of each section of the 1933 Act.

(e) A file of Commission minutes on no-action matters which includes memos explaining the staff's conclusions and recommendations on matters brought up for Commission consideration.

(f) A chronological file of all letters and memoranda rendered by the Office of Chief Counsel, Division of Corporation Finance, which includes all no-action letters issued.

(g) A listing of all companies for which Commission files are maintained, with a classification code keyed to identify companies in which similar disclosure problems were encountered.

The summary of interpretations is prepared by a law student clerk under the supervision of the senior Assistant. (Summaries are never prepared by the originating staff attorneys.) The usual practice is for the law student, monthly, to select for summary a group of the more significant no-action letters sent by the office. Occasionally letters will have been marked for summary during preparation—particularly those signed by the Director of the Division. From the selected group of letters, the Assistant Chief Counsel selects those to be summarized. The law student summarizes the facts and reasoning underlying the letter and submits the summaries to the Assistant for review and approval. Those summaries are then utilized both in the card file of interpretations and in the monthly summary sheets distributed to the staff attorneys.

While the criterion for selection of no-action letters for summary is somewhat unclear, the general understanding of the law student is that he is to select the cases that have "precedential value." However, he is instructed not to prepare cards on "questions of fact" such as "control" or "change of circumstances," because each case is viewed as limited to its own facts. On the other hand, he usually selects most cases which are the subject of a commission minute.

Questionnaire responses suggest that none of the available internal research sources are very heavily utilized. Most favored by some staff attorneys (though apparently less than half) is reference to a personally-compiled file of previous no-action letters, which apparently is consulted in somewhat more than half of the cases by those who use such a file regularly. (30% of respondents.) Next most frequently relied upon, in 20–30% of the cases, by less than half of the responding attorneys, are personal conferences with other staff attorneys. And the card file of interpretive summaries, running a poor third, is apparently used quite infrequently. (See questionnaires, appendix I, question 27.)

Virtually no research use appears to be made of the monthly summaries of interpretations that are distributed to all staff attorneys. Apparently this results from the form in which the summaries are produced, primarily because of the absence of any indexing system. All of the same information is available in indexed form in the card file of summaries; but use of the card file requires the staff attorney to go to the library in the office of the Chief Counsel.

In considering the relatively infrequent use made by the staff attorneys of the available internal research sources, it should be remembered that the routine nature of most of the no-action matters invites little research. Furthermore, the ad hoc and subjective quality of the typical determinations of "ultimate fact" tend to encourage the view that conclusions are to be drawn from the facts and not from research. Thus, though the Assistant Chief Counsel attempts to promote a view of no-action matters as legal and interpretive questions, rather than exercises of discretion, it seems doubtful that that view is generally accepted. Questionnaire responses indicate that the less-experienced staff attorneys find their own "reservoir of experience" sufficient in 70% of the cases, and the more-experienced staff attorneys in almost 90% of the cases. (Questionnaire, appendix I, question 29.)

D. *Review*

Internal review of staff responses to no-action requests is the primary responsibility of the two Assistant Chief Counsel of the Division, and appears to be thorough. Staff attorneys submit a proposed form of response to one of the two Assistants who, after review and any necessary revision, sends the letter under his own name, as Assistant Chief Counsel, Division of Corporation Finance. Review by the Assistants appears to be demanding, resulting in reversal of the disposition recommended by the staff attorney in approximately 30–40% of the cases. The staff attorneys apparently consider the rate of reversal to be considerably lower: slightly less than 5%. (See questionnaire, appendix I, question 25.) That disparity may be explained, in part, by the fact that one of the Assistants seldom discusses revisions with the staff attorneys. (In all instances, however, the originating staff attorney receives a copy of the letter in final form.) And the other Assistant may discuss the matter with the staff attorney, suggesting areas for further inquiry, without expressly rejecting the proposal. To a large extent, the senior assistant regards the review process as a training opportunity, discussing the matter with the staff attorneys wherever the initial draft suggests misunderstanding or inadequate research.

Unless a specific request is made applicants are not informed of the staff's conclusion prior to their receipt of the responding staff letter. Therefore, most opportunity for argument arises in the course of the staff attorney's preparation of a recommended response. After receiving a response and *upon inquiry*, applicants are advised that they may submit additional facts or argument for staff consideration. But in a large proportion of the cases (70–90%), nothing further is heard from the applicant after the response is sent.

No information is volunteered to applicants about the possibility of appealing staff advice to the Commission; and disclaimers by the staff of authority to speak for the Commission may lead many applicants to suppose that appeal is unavailable. However, Commission minutes indicate that it generally undertakes to dispose authoritatively of those no-action matters brought to it by the staff for consideration.

Upon inquiry about the possibility of appeal, an applicant will be advised that he may request the staff to bring the matter before the Commission; and all such requests are, in fact, brought to the Commission (or to a duty officer—see *infra*). However, the applicant is not invited to appear before the Commission or to make a written submission; and he is discouraged from requesting an appearance of making a submission in at least two ways. First, upon asking about the availability of a procedure for taking the no-action matter to the Commission, the Assistant's standard response is substantially as follows:

> You may request to have your matter brought to the Commission for consideration. This is the procedure: We [the staff] prepare a statement of the facts and a memo in which we present your position and arguments and the staff's position and arguments, together with our recommendations to the Commission.

Second, no mention is generally made of an opportunity to appear before the Commission. And where an applicant inquires about the possibility of an appearance, the standard response is: "You have a right to request to be heard, but such requests are seldom granted." Generally the staff memo submitted to the Commission in such matters recommends against hearing the applicant or his attorney, on the ground that the staff believes he has nothing to add to the arguments submitted on his behalf by the staff.

Much of the staff resistance to appeals arises from a sense of obligation to preserve the Commission's time for important matters. Until recently the staff had been operating under instructions to bring the Commission all no-action matters involving a proposed offering valued at $1 million or more. As a result, though the Commission encouraged the staff not to adhere religiously to that rule, a substantial number of no-action matters were brought to the Commission at the instance of the staff, in addition to those appeals arising from an applicant's persistence. However, most cases brought by the staff for Commission consideration were selected in order to obtain a clarification of policy.

The Commission has recently taken two steps designed to reduce the burden of no-action matters reaching it for review. The "automatic appeal" rule for matters exceeding $1 million has been withdrawn; and the Commission's "duty officer," a single Commissioner on a rotating assignment, has been delegated the power "to determine whether the Commission should or should not grant a request for Commission review of a no-action request which had been denied by the Division." (Commission Minute, May 19, 1969).

The urge to protect the Commission from an excessive burden of no-action matters may be partly responsible for the "cave-in" phenomenon—the staff's reversing an earlier denial rather than complying with a request for Commission review. It is difficult to trace concrete examples of that phenomenon, but it is acknowledged by the senior Assistant that such "cave-ins" occur from time to time where the staff regards an issue as a "close question." On the other hand, it has been asserted that the reason for the "cave-in" may be the staff's reluctance to give the Commission an occasion for reversing a favored interpretive position. In any event, rumor has it that the "cave-in" practice is well understood among the knowledgeable SEC practitioners, and that it presents difficult ethical problems: a request for Commission hearng is thought to consume the staff's good will"—with the result that counsel must choose which clients are entitled to deplete his "good will" with the staff.

In most instances, the form of Commission action in reviewing no-action matters appears to involve an authoritative Commission disposition, effectively constituting an "order." A typical minute entry relating to a no-action matter may read:

> Upon the recommendation of the Division of Corporation Finance, . . . the Commission denied the request of Mr. A for a "no-action" letter with respect to his proposed sale of ____ shares of X Corporation common stock and also denied his request to be heard by the Commission in the matter.

Or in another form:

> For the reasons stated in a memorandum dated ________ the Division of Corporation Finance recommended that the "no-action" request be granted. That recommendation was approved.

While the reasons for the Commission dispositions are seldom reflected in the minute entries, there is no doubt that the Commission takes specific action on the particular case brought before it. There is no basis for supposing that it merely gives general approval or policy direction to an informal staff process which it authorizes but does not adopt.

An examination of Commission minutes for the period May 10, 1967, through May 14, 1968, revealed that 45 no-action matters were brought before the Commission for consideration. It is not apparent how many were brought at the instance of the applicant, but in nine instances the papers accompanying the submission to the Commission indicated that a request for appearance had been made. Five cases reflect an appearance by counsel; while four cases expressly reflect the Commission's refusal to hear counsel. The disposition of no-action matters before the Commission is reflected in the following summary:

Period: 10 May 1967—14 May 1968

No-action matters before the Commission	45
Commission reversals of staff recommendations	4
Reversals of recommended *denials* of sale	1
Reversals of recommended *approvals* of sale	3
Commission acceptance of recommended denials of sale	19
Commission acceptance of recommended approvals of sale	20

Period: 4 June 1968–30 December 1968

No-action matters before the Commission	11
Commission acceptance of recommended approval of sale	11

The reduced burden of Commission action in the period commencing 4 June 1968 obviously reflects the revised instructions pertaining to review of proposed sales exceeding one million dollars. But it also reflects the Commission's guidance of staff judgments *approving*, as well as disapproving sales.

E. *Form of the No-Action Statement*

Typically, a no-action letter makes reference to the requesting letter, recites all of the material facts supplied by the applicant (referencing the source) or incorporates the applicant's letter by reference, and—generally without interpretation—states a conclusion. In an effort to reduce the burdens of the no-action process, the Division at present frequently follows the practice of merely incorporating the applicant's letter by reference without repeating the facts. Obviously this practice would make no-action letters much less useful as precedential guides, both for internal purposes and in the event of ultimate publication or availability pursuant to the Public Information Act. Some staff members also suggest that failure to repeat the facts renders no-action letters much less reliable as a protection for brokers who are asked to execute transactions in the unregistered stock, for it will be more difficult to satisfy their duty to investigate their seller.

The conclusions expressed in no-action letters typically follow the following patterns:

(a) "Based on the facts presented, we are not able to conclude that the sale of ____ shares of ________ Corporation to the public at this time would be exempt from the registration requirements of the Securities Act of 1933."

(b) "On the basis of the facts submitted, this Division will not recommend any action to the Commission, if ____ sells the ____ shares of ____________ Corporation without compliance with the registration requirements of the Securities Act of 1933."

(c) "Based on the facts presented, this Division is unable to conclude that the ____ shares of ________ Corporation may be sold by ____ without complying with the registration requirements of the Securities Act of 1933."

(d) "Based upon the facts presented and particularly in view of the short holding period by the present owner and preceding owner, and the medical circumstances that arose before the purchase of the shares, this Division is unable to conclude that the shares which your client owns may be sold without compliance with the registration requirements of the Securities Act of 1933, as amended, or Regulation A, if available."

(e) "Based on the facts presented, including counsel's opinion that Mr. ______'s continued need for medical attention is a new and unanticipated circumstance, although an exemption from the registration requirements of the Securities Act of 1933 is not free from doubt, in view of the small amount of your client's holdings, this Division will not recommend any action to the Commission if the ________ shares of ________ Corporation stock are sold without compliance with such requirements."

(f) "Based on the facts presented, this Division will not recommend any action to the Commission if your client sells the shares in question without prior compliance with the registration requirements of the Securities Act of 1933 in reliance upon your opinion as counsel that the proposed transaction is exempt therefrom." (See appendix L–6.)

(g) "Based upon the above facts, as more fully set forth in your [counsel's] letter, we are unable to concur in your opinion.

Accordingly, no public offer or sale of the shares of X Company by Mr. B should be made without compliance with the registration requirements of the Securities Act of 1933." (See appendix L–7.)

VII. Relation of No-Action Letters to Compliance Programs

Former Chairman Cohen has commented that the no-action letter process is one "where an ounce of prevention is worth . . . a pound of enforcement." That view of the compliance benefits of the no-action process is widely held among the senior administrators on the SEC staff, and is probably well-founded. Yet that conclusion seems to be based primarily upon the administrators' experienced "feel" for their subject, for no available studies indicate how broadly the compliance benefits of the no-action process have reached into the securities business. Surely the results of the no-action process do not overwhelmingly favor the applicant—a fact which could induce many stockholders and brokers to take their chances rather than draw regulatory attention to a proposed transaction.

Earlier discussion suggests that the Division's liberal advisory practices, together with very real disciplinary threats, have produced the heavy demand for no-action letters and may continue to produce that demand. But no studies indicate how extensively the educational effects of the advisory processes have pervaded the industry. Discussions with N.A.S.D. personnel suggest that understanding among dealers may be largely limited to the view that stock with a restrictive legend may not be sold without a no-action clearance. There may be general understanding of the obligation to investigate "control" persons, but it is likely that most registered representatives make little or no effort at investigation unless they are independently aware of a seller's controlling status. And there may be little or no understanding of the need to determine whether a holder of unlegended stock may have obtained that stock from a controlling person. In any event, it is clear that nothing in the N.A.S.D. training program for registered representatives deals adequately with these problems; and there is nothing in the exams for either principals or registered representatives dealing with them.

There are no studies to indicate the extent of actual compliance where the staff refuses to take a no-action position. It may be inferred that most stockholders would comply. And those who understand the Securities Laws should, of course, be aware that a subsequent sale could provide the basis for a charge of willful violation. But neither studies nor enforcement programs have focused upon the effect of a staff refusal; and all conclusions in this area must be based on inference.

Enforcement personnel generally regarded the no-action letter as an important part of the compliance program. Copies of all no-action letters are sent to the Regional (enforcement) Office nearest the city in which the proposed transaction would occur. But according to the Director of the Washington Regional Office, compliance benefits do not result from direct follow-up of staff refusals of no-action positions, and very few enforcement proceedings arise in that manner. (See also appendix B, p. 7.) Rather, no-action letters enable him to keep up with what is happening with particular companies and in the business generally; and they enable him to keep up with the thinking of the staff on particular interpretive and enforcement problems. To those ends, the letters forwarded to the Regional Office are circulated among the senior personnel in the Regional Office. Occasionally, also, a letter may prompt the Regional Director to object to a particular staff position, particularly if the same or similar transaction is under investigation in the field.

Where an investigation or enforcement proceeding is already underway, of course, the no-action process is administered to minimize the probability of any further illegal distributions that might prove damaging to purchasing stockholders. Thus, the processing of no-action letters routinely involves a file check to determine the pendency of any investigations. Typically, where an investigation is pending, the staff will refuse to take a no-action position, often in a letter that is almost totally uncommunicative. (See appendix L–2.)

Thus, it appears that from the standpoint of compliance the primary benefits of an unrestricted advisory process are in educating the industry for, and encouraging, voluntary compliance. It remains to be demonstrated that unrestricted availability of no-action letters is a promising means of achieving that end.

VIII. NO-ACTION LETTERS AS NONPUBLIC PUBLIC LAW

In considering the status of no-action letters as "law," three different products of the no-action process should be segregated:

(a) "Orders" entered upon Commission review, determining an applicant's entitlement to a no-action letter, together with the related no-action response, staff memoranda to the Commission, and any interpretive summaries reflecting the result;

(b) No-action letters which, though not reviewed by the Commission, provide the basis for internally-distributed interpretive summaries; and

(c) Other no-action letters rendered by the staff which are neither reviewed by the Commission nor summarized for internal distribution.

The Commission-reviewed no-action positions and accompanying statements would seem, in a lawyer's view, to constitute "law," for they involve a final official disposition of a concrete claim not unlike the mass of case law on which lawyers commonly rely for guidance. Surely such determinations are "orders" within the meaning of section 2(d) of the Administrative Procedure Act, for the agency renders "a final disposition . . . declaratory in form . . . in a matter other than rulemaking but including licensing." And such orders may well constitute a "license" within the broad language of section 2(e), for in reality, they constitute a "form of permission."

Furthermore, the staff and Commission appear to treat prior Commission-approved no-action dispositions as precedent. Throughout the supporting memoranda there are frequent citations to the precedents found in prior no-action dispositions, with many general citations and frequent specific citations. Thus, in the 45 no-action dispositions by the Commission between 10 May, 1967 and 14 May, 1968, there were at least 14 specific citations to the authority (or lack of authority) or prior Commission-approved no-action dispositions. (See the summary of citations to no-action dispositions compiled in appendix G.)

In considering the Commission dispositions as "law," it is important to recognize that they assume that status because they reflect Commission action and not because they are interpretive or analytical in form. The Commission minutes ordinarily do not reflect the Commission's reasons for its conclusions in particular no-action matters, and the reasons must be inferred from the facts, interpretations, and discretionary considerations set forth in the accompanying staff memoranda. While the Commission actions ordinarily appear to involve "interpretations," there is no assurance that that is the case, for often they may also reflect other concerns: the hardship imposed by compelling rigid compliance with registration requirements, an assessment of the "quality" of the company and the probability of injury to a purchasing stockholder if the proposed sales are made, and similar "discretionary" considerations.

The same considerations affect evaluation of all no-action letters except those very few that are, in form, expressly interpretive. The former Chief Counsel of the Division of Corporation Finance has commented:

> I do not believe it is helpful . . . to attempt to make a distinction between no-action and interpretive letters. . . . By far the more numerous are those situations in which it is difficult, if not impossible, to tell whether the staff advice is intended as an interpretation, or merely as a statement that enforcement action will not be taken. . . . It is difficult for the reader to make a distinction between the two types of letters because of the rather peculiar phraseology . . . but more importantly because it is impossible for the reader to know what factors were, in the mind of the staff member who wrote the letter, determinative of the position taken. . . . Also, it is not always clear to the staff member whether he intends that the letter constitute an interpretation or merely a statement that enforcement action will not be taken. . . . It was my experience that normally when a request for advice was referred to the Commission . . . [it] considered the question as one of interpretation of the securities laws. This was true even though the person who had requested the advice may have desired nothing more than an assurance that no enforcement action would be instituted. . . . Conversely, in some instances when the staff referred matters to the Commission as interpretive questions, the Commission disposed of them as if they were nothing more than requests for assurance that no enforcement action would be instituted. (Appendix B, pp. 1–2.)

The uncertainty created by the interaction of legal interpretation and discretionary enforcement policy may compel careful appraisal of the statements of Commission and staff in order to reach a judgment about their interpretations or policies. But uncertainty about the motivations for official decisions is a problem that lawyers must continually puzzle from their days as a first-year law student. That uncertainty renders the "no-action" decision no less law, whether rendered by the Commission or by the staff.

Whether the staff interpretations, either as reflected in the original no-action letters, or as reflected in those letters taken together with related interpretive summaries, are "law," must depend upon the purpose for which that question is asked. For example, it seems likely that the summaries of interpretation, together with the applicable no-action letters, may well be viewed as "instructions to staff that affect any member of the public" within the meaning of the Public Information Act. 5 U.S.C.A. § 552(a)(2)(C) (1964).

There can be little doubt that the interpretive summaries, whether based upon a Commission disposition or upon an unreviewed staff letter, provide a body of internal precedents which "affect" members of the public who request no-action letters. The senior staff counsel regard it as their function to maintain internal consistency in rendering no-action letters; and to that end the staff attorneys are urged to view the problems presented by no-action requests as legal questions to be resolved by traditional legal, interpretive techniques. The entire process of summarizing and circulating interpretive statements and maintaining a card file of interpretations can only be intended for that purpose. Thus, the senior Assistant states that he particularly expects the newer staff attorneys to "spend a lot of time in the cards;" and he discourages them from basing their recommended decisions on "discretionary" factors.

Of course it is essential to recognize that both the senior counsel and the staff attorneys are agreed that a large proportion of the routine no-action letters are not of precedential value. (Questionnaire responses indicate 7% : see appendix I, question 26.) In large part this is due to the routine nature of the questions usually presented, which also results in the relatively low staff use of the internal research tools. But use of the research tools continues at a rate roughly comparable to that proportion of cases in which the staff attorneys find their experience inadequate for preparation of a no-action response. (Questionnaire, appendix I, question 29.)

Another factor of importance contributes to the view that many no-action matters are not of precedential importance: the widely held staff position that many no-action matters reflect only conclusions of "ultimate fact" peculiar to the facts of a particular case. Thus, the practice has developed of treating most "change of circumstance" claims as single unique cases without precedential value. Yet certain patterns of decision are surely reflected in those cases. For example, it seems likely that the worsening of a medical condition that existed at the time of purchase of the stock in question will *not* support a claim of "changed circumstances," though such a claim *may be based* upon a new medical condition that arises after purchase of the stock. But if the medical condition, though it subsisted at the time of purchase, has grown worse, when the prognosis was that it would improve, sale may be authorized—at least, where no substantial distribution is involved. Similarly, claims of changed circumstances resulting from termination of employment are often rejected; but if the applicant can support his claim with a showing that he had a written, unqualified three-year employment contract, he may be successful.

While all of these applications of the "change of circumstances" concept may have been affected by the presence of other "discretionary" considerations, such concrete interpretive examples are helpful to staff counsel precisely because they indicate the quality of the "change" currently viewed as sufficient by the Assistant Chief Counsel. And for that reason, one of the more important research tools relied upon by the staff counsel are their own copies of previous no-action letters and consultation with their colleagues. (Questionnaire, appendix I, question 27 (f), (g) and (j).)

The effect upon an apparent "interpretation" of such discretionary considerations is not to be discounted, however. A good example is found in the no-action matter before the Commission in appendix L–5. There, the summary card is marked "card only" because it is considered too unique—as a "change of circumstance" matter—to be included in the summaries distributed monthly to the staff counsel. The card provides an interpretation of the Commission decision which appears to demonstrate that the Commission found no "changes" beyond earlier anticipation. And the card recognizes at least one of the typical "discretionary" types of considerations that affect judgment, noting that the applicant's investment intent was compromised by the fact that he had made earlier repeated attempts to obtain a no-action letter. But the card indicates nothing about the impact of yet another "discretionary" consideration found in examining the staff's supporting memorandum to the Commission. That memorandum shows that one of the applicants had been counsel for the president of the issuer, who was currently under investigation, and was thought to have been aware of the president's illegal activities. On that account, one of the Regional Offices had indicated that in the circumstances a no-action letter should not be granted. While such additional considerations may or may not have had an effect on the outcome in this instance, availability of that information is helpful to a full appraisal of the Commission action in denying the application, and in that sense is a part of the "law" of the case.

One other aspect of the file of interpretive summaries may render them unreliable as a basis for determining current interpretive positions: the file includes an historical accumulation of cards reflecting positions taken at various times in the past, many of which may have been superseded by new positions, also summarized in the cards. Informed researchers approach the cards with caution, frequently consulting one of the Assistants on apparent conflicts of position. That movement and conflict do not, however, diminish the role of no-action determinations as "law," though it may be necessary to research thoroughly and resolve conflicting positions.

Finally, the caution required in using no-action letters as guides to interpretation is illustrated by comparing the letters reproduced as appendices L–6 and L–7. Here, one applicant is permitted to sell 225,000 shares representing 14.5% of the issuer's outstanding stock, the last 75,000 shares of which were acquired 14½ months earlier. The other applicant is denied the right to sell 5,006 shares (presumably much less than 14.5% of outstanding) which were acquired in an exchange effective approximately 16 months earlier. Both applications appear to be based upon a claim of unanticipated discharge from employment, and neither staff letter includes any explanatory rationale. While some theories might be elaborated to explain the difference, no adequate explanation appears on the face of the letters.

IX. THE ROLE OF DISCRETION

As suggested above, the body of law found in the staff and Commission interpretive positions may be heavily influenced by various discretionary considerations that are brought to bear on specific no-action determinations. Those discretionary factors, together with the ad hoc nature of many "fact" determinations, have created a body of interpretive law in which "uncertainty and divergence of practice presently prevail to an unacceptable degree," according to the *Disclosure Study*. (See pages 16–17, *supra.*)

While many discretionary considerations undoubtedly contribute to the uncertainy, others reflect staff efforts to provide means of protecting investors within a clumsy statutory and interpretive structure. Many of the concepts and distinctions required by currently-accepted interpretations of the 1933 Act have no real relevance to the protection of investors. The *Disclosure Study* commented:

> The most casual inquiry into the effects of prevailing interpretative pattern discloses its grave shortcomings. . . . Sale without registration may turn on events wholly unconnected with the needs of investors. . . . (Disclosure Study at 155–56.)
>
> * * * * * * *
>
> An obvious question may be asked: in what possible way is . . . "change of circumstances" relevant to the needs of public investors, so as to justify the sale of . . . shares without appropriate disclosure? The easy answer to the question is "none." (Disclosure Study at 170.)

* * * * * * *

> In application, the present "fungibility concept" bears little relationship to the needs of investors for disclosure. It has never been formalized as a Commission rule or interpretative release, and hence introduces an additional element of uncertainty into an already clouded situation. (Disclosure Study at 174.)

It is apparent from the *Disclosure Study* discussion of these problems that many interpretive positions were taken, and many discretionary factors taken into account, in order to prevent the formal structure of registration from choking off legitimate securities transactions intended to be exempted from the Act. The framework of subjective, "ultimate fact" judgments provided the flexibility necessary to reach doubtful distributions, while permitting sales which appeared to be prompted by the financial needs of an innocent shareholder. But focussing on such subjective considerations often made confident judgment impossible precisely because the root of the matter involved shareholder's motivations. Thus, one staff attorney commented that the simple question of adequacy of a two to three-year holding period could be decided adequately by a G.S. 2, but "for those involving a change of circumstances a solon would fail."

It is little wonder that under such circumstances, often involving a determination which might as well be decided by a flip of the coin, various other factors more obviously pertinent to the protection of shareholders should be taken into account. Many of those factors, mentioned at various times in discussion with staff personnel, are listed in the Questionnaire, question 30, together with appraisals of their relative importance. And the frequency with which such discretionary considerations were instrumental in decision is reported to be between 37% and 45%. (Response to question 14.)

There have been occasional suggestions that political factors play a large role in obtaining a favorable no-action response from the staff or Commission. (See questionnaire, appendix I, question 31, remarks of Respondent #4.) And in at least one instance, available records seem to reflect "political" considerations. (See appendix L–4.) But a careful analysis of many cases in which Congressmen made written "status" inquires with the Commission failed to demonstrate any substantial effect, except possibly a prompt review of the matter and the preparation of an explanatory memorandum for the Congressman.

Undoubtedly the most significant "discretionary" factor that plays a role in the outcome of no-action requests is the pendency of an investigation or an enforcement proceeding. Where a regional office or the Division of Trading and Markets indicates that a "hold" should be placed on no-action letters concerning stock of a particular issuer, a no-action request ordinarily will be met by a simple uncommunicative rejection. That practice seems often to be followed regardless of whether the immediate applicant appears to be involved in the potential proceedings. And it also seems that the staff is much more reluctant to authorize a no-action position for the benefit of a stockholder who has previously been found to be a securities violator.

Various other "discretionary" considerations which appear to play a part in decision reflect a desire to assure protection of the investor. Thus, particularly in close cases, the staff is more likely to look favorably on proposed sales of stock of a reporting company, or of the same class as that recently registered by the issuer, or sales which are within the ordinary trading volume of the stock in question.

The role of various discretionary considerations are demonstrated by the following brief explanations of some of the no-action matters reproduced in the illustrative appendix L:

Appendix L–2

(Commission Minute, Memorandum from Division of Corporation Finance and Memorandum from Division of Trading and Markets)

Here Mr. A has held the stock in question for what would ordinarily be an adequate "holding period" before seeking permission to sell. With respect to the interpretation by which Mr. A seeks to justify his sale, the Division *expressly* agrees that his "conclusion of law is correct." But because the Division of Trading and Markets suggests that the issuing company may be merely a shell, that some of the promoters of the Company have been involved in prior securities violations, and that the applicant had served the Company as counsel, a no-action letter is denied. In this case, after receiving three responses from the staff that were totally uncommunicative about the reasons for denial, Mr. A has threatened to make a sale of a portion of his holdings and to invite Commission enforcement personnel to witness the sale.

Appendix L–3

(Interpretive summary card, Commission Minute, and Memorandum from Division of Corportion Finance)

Appendix L–4

(Commission Minute and Memorandum from Divsion of Corporation Finance)

These matters should be considered together. The matter presented in L–3 demonstrates a routine disposition of a claimed "change of circumstances" arising out of pressing financial and business circumstances. The staff generally views such circumstances as ordinary financial risks which the stockholder may have anticipated. Similar considerations might have produced a similar result in L–4. Indeed, the Division memorandum so recommends because an accident and engineering difficulties put the applicant behind schedule and created his claimed "change of circumstances." In the staff's view, those contingencies would reasonably be expected as part of the risks of developing a new device. But the Commission was obviously swayed by the excessive burden of the risks involved, by the possible impact upon the many employees of the applicant, or by the intervention of administration officials. The second of these no-action matters does not appear to have been made the subject of an interpretive summary.

Appendix L–5

(Interpretive summary card, Commission Minute and Memorandum from Division of Corporation Finance)

This matter expressly reflects on the interpretive summary card the view that early and repeated attempts to obtain a no-action letter may compromise any claim of original investment intent. Further, it demonstrates that additional enforcement considerations may play a part in decision, though not reflected on the summary: in this case, the pendency of an investigation of the issuer and the applicant's possible involvement in the matter under investigation. For that reason, it leaves some doubt whether the interpretive summary reflects all of the reasons for the result.

Appendix L–8

(Commission Minute Only)

This case involved an apparently legitimate claim on the part of a former member of a controlling family group that family friction, and his resulting expulsion from any policy-making position in the company, constituted a "change of circumstances" which could justify sale. Though such claims have not infrequently been approved, the Commission here disapproves because of a policy decision to deny no-action letters to all members of controlling family groups.

Appendix L–10

(Commission Minute Only)

Although the practice is not frequently followed, the Commission will occasionally extract a condition as the basis for granting a no-action letter. Here the Commission imposes such a condition, presumably because of the applicant company's affiliations with other management companies. In one instance, a variation of this theme (not included in appendices), the Commission "concluded that, under the special facts here involved, the staff might take a 'no action' position after the expiration of two years" from the date on which the applicant had acquired the stock in question—an authorization to the staff somewhat at odds with the theory that investment intent is proved *after* an appropriate holding period.

IX. CONCLUSIONS AND RECOMMENDATIONS

A. *General*

The no-action process as administered by the Division of Corporation Finance appears to be a sophisticated and effective system of providing informed and specific staff advice under active Agency supervision. The basic conclusion of the Task Force On Legal Services and Procedure, Second Hoover Commission, appears to remain sound:

> By practice and precedent, letters of advice and staff opinions are given limited validity . . . [by several agencies.] This excellent practice in administrative procedure has been most effectively used by the Securities and Exchange Commission, which issues several thousand such opinion letters annually. . . . The satisfactory experience of agencies which have . . . followed the practice . . . suggests the advisability of a more general use of the advisory opinion by all agencies of the executive branch (Report, Task Force on Legal Services and Procedure, p. 189–90 (1955).)

That accolade is justly cited with pride by Division personnel; and the accessibility and pragmatism of Division personnel, as reflected in the no-action process, is an outstanding example of an agency making government work effectively within the inevitably rigid confines of governing statutes. By exercising discretion to modify statutory rigidity and grant advisory assurances concerning enforcement intentions, the staff and Commission enable businessmen, in compliance with law, to execute legitimate securities transactions, while restraining transactions that may appear to offend the basic policy objectives of the 1933 Act. But as the demand for advisory assistance has grown, the emphasis on accessibility and service to the industry has begun to overshadow the major objectives of the advisory processes.

The major objectives of the no-action advisory processes are, in part, set forth in a Division memorandum:

> The no-action letter procedure is used to assist persons to comply with the law in prospective transactions, and to assist in effectuating transactions that do not appear to be contrary to the intent of the statutes and rules. (Memorandum to Warner W. Gardner, appendix E, p. 3.)

To this statement of objectives should be added further objectives: "advising the staff in advance of activities that might be questionable" (appendix E, p. 2); and encouraging a flow of information about financial and regulatory problems to assist the staff and Commission in developing, elaborating and testing concepts and policies for current and future application.

The present policy of granting specific advisory clearances for specific transactions, including a mass of routine transactions, appears to operate on the implicit assumption that the best way to "assist persons to comply with the law in prospective transactions" is to run a clearinghouse for those transactions. Yet that objective may often be served far more effectively by emphasizing practices designed to broaden public understanding of staff and Agency interpretive and policy judgments—a goal that is defeated at present by the failure to make available a large part of the staff and agency interpretations.

The "clearinghouse" concept of the staff's advisory role also interferes with its effective performance of the important function of exploring new (and variants of old) regulatory problems and developing sound interpretive positions and rules. Many, perhaps most staff and Commission interpretive positions relating to registration obligations arise out of experience with problems presented for advisory assistance. The most experienced staff members should have ample opportunity to give full consideration to the implications of new or unique fact situations and to give attention to the development of a sound and consistent body of interpretive positions. But the present emphasis upon providing routine assurances is in fundamental conflict with that objective. The rules proposed by Commissioner Wheat's *Disclosure Study* reflect a substantial effort to diminish that conflict; but additional steps should be taken to strike a better balance in favor of educating the bar and the public and giving adequate attention to the development of a sound and consistent interpretive structure. The staff should not continue the hopeless effort to respond to every routine request for an advisory assurance.

Discouraging the flow of routine no-action requests will, of course, diminish the opportunity for the staff to be advised in advance "of activities that might be questionable." However, no-action applications are not a prime source of information about questionable trading in unregistered stock; and few, if any, cases could be cited by enforcement personnel in which a no-action application first alerted the enforcement staff to such violations.

B. SPECIFIC CONCLUSIONS AND RECOMMENDATIONS

1. *The Need to Minimize the "Clearance" Function of No-Action Letters and to Maximize Public Information About the Grounds for No-Action Dispositions*

At present the Division of Corporation Finance processes an excessive and unnecessary burden of requests for no-action clearance of transactions presenting routine interpretive or discretionary questions. As a result, it is doubtful that the major objectives of the advisory processes are well served.

The agency cannot hope, through its advisory processes, to reach the bulk of transactions which may present serious questions of compliance. And it is equally unrealistic to suppose that the rendering of unpublished responses to routine requests for advice will educate the public generally, or the bar in particular. While this practice may restrain some specific undesirable distributions, and may gradually educate a group of SEC specialists, the mass of questionable but routine transactions should be susceptible of restraint by other means.

The bulk of advice dealing with routine types of transactions consumes the time of some of the best informed and most experienced attorneys in the Division. Yet processing such advice adds little to their experience and presents few new fact situations to encourage new thought about the interpretive positions and policies of the agency. The capacity of the senior staff to anticipate new problems and propose means of meeting them are well illustrated by the occasional interpretive releases. (See, *e.g.*, Securitites Act Release number 4982, July 2, 1969, "Application of the Act and the Securities Exchange Act of 1934 to spin offs of securities and trading in the securities of inactive or shell corporations.") But though the SEC is well advanced over most other agencies in this respect, the competition is poor. Promulgation of such releases remains an occasional thing, and they are seldom as specific or concrete as they might be made with a full infusion of the experience gained by the staff in rendering no-action advice. Furthermore, while staff effort is effectively devoted, from time to time, to the development of general interpretive releases, it is unrealistic to suppose that experienced administrators, sensitive to the complexity of interpretive problems, will ever be inclined to favor frequent or extensive statements of interpretive positions. The predictable reaction will more often be that of the staff as set forth in the case described in appendix L–1. There, after receiving Commission instructions to consider "formulation of a general policy," the staff responded:

> [T]he Division . . . concluded that it would be difficult to draft standards of general applicability to these situations. The staff also expressed the view that adoption of general standards would sacrifice a measure of administrative flexibility and recommended that for the time being each request be considered on an individual basis.

And after a further request:

> The Division still believes that these questions should be decided on a case by case basis. . . . Perhaps [in other circumstances than the instant no-action request] . . . a good reason [for a general exception to an interpretive rule] exists, but that need not be decided now. (Appendix L–1, pp. 3, 4.)

The best alternative to frequent, extensive and concrete interpretive releases would be general availability of the interpretive positions taken by the Commission and by the staff on a case by case basis. Yet the interpretive summary cards, designed to reflect those interpretive positions, are presently regarded as unreliable even by the senior staff attorneys. Rather than being central to the interpretive process and prepared concurrently with the related no-action letters, they are prepared by the most inexperienced man in the Division (though under supervision of the senior Assistant) long after the decision is made. And given the burden of no-action matters and the concentration on the interpretive end-product, the senior staff personnel could hardly be expected to devote adequate effort to the distillation of interpretive explanations from concrete cases or to the necessary reviewing and sifting of interpretive positions. As a result, the consistency and development of interpretive positions are, to an unnecessarily large degree, embodied in the experience of the senior personnel of the Division. And embodiment of experience in mortal form (the Director is past retirement age) makes the Division over-dependent on key personnel and hampers the analysis of trends and patterns of interpretation and the continual re-examination of positions that are essential to the development of a sound interpretive structure. Further, such experience cannot readily be published as an interpretive guide.

The present burden of no-action matters appears to arise from a totally unrestricted advisory policy, from uncertainty about the interpretive positions likely to be taken by the staff, from the need of broker-dealers for reliable advice, and from the unreliability of counsel's advice as an assurance against enforcement or injunctive proceedings. See discussion at pages 11–19, *supra*.

The staff's unrestricted advisory policy, originating in a commendable effort to remain accessible to the public, has, for many routine transactions, become a clearance process akin to a licensing bureau. That does not seem to have been the intent of the act; and the staff is not manned to perform that function.

The uncertainty of the interpretive structure is well documented by the *Disclosure Study*. Much of that uncertainty results from the subjective quality of the determinations required of the staff and the artificiality of the fact basis for their decisions. In essence, the staff is required to make "jury" determinations of facts concerning motivation and intent without an adequate factual basis for judgment. While the rules proposed by the *Disclosure Study* may relieve much of the pressure to decide such questions, they are unlikely to obviate the need for further structuring of the advisory processes.

Finally, as discussed *supra*, pages 15–19, it appears that the applicants are inclined to favor the no-action process because the agency discourages reliance on private counsel and because private counsel are uncertain about current staff and agency interpretive positions. Agency policy, in turn, appears to be founded in part upon a lack of confidence in the competence or ethical reliability of counsel.

To the extent that the agency is concerned with competency, it should pursue policies, such as full disclosure of interpretive positions, designed to maximize available interpretive tools. And it should exercise its power over practice before the agency to discourage the rendering of counsels' opinions on the basis of inadequate legal or factual investigation or in disregard of available interpretive positions. This would seem to be encouraged by the recently-revised A.B.A. Code of Professional Responsibility, which provides:

> DR 6–101 Failing to Act Competently
>
> (A) A lawyer should not:
>
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer, who is competent to handle it.
>
> * * * * * * *
>
> DR 7–102 Representing a Client Within the Bounds of the Law
>
> (A) In his representation of a client, a lawyer shall not: . . .
>
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. . . .
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
>
> (American Bar Association Special Committee on Evaluation of Ethical Standards, *Code of Professional Responsibility,* pages 74 and 86–87 (A.B.A. 1969).)

Recommendations

(a) For the present, the no-action process should remain broadly available on a routine basis. After publication of adequate guidelines to interpretive positions, including full statements of specific no-action cases, as recommended *infra*, the process should be available on a selective basis under published procedural rules which authorize the staff to decline to render no-action or advisory letters with respect to matters fully covered by available interpretive materials.

(b) Where advice is regularly given which authorizes conduct that would otherwise be subject to potential enforcement proceedings, applicable interpretive rules governing staff advice should not depend upon subjective standards requiring staff determinations of an applicant's intentions or motivations. Where interpretive positions require such determinations, provision should be made for full hearing before an examiner for an advisory determination.

(c) The enforcement and compliance procedures of the regulatory structure should not place a premium on staff advice and "clearance" of prospective transactions in preference to reliable private legal advice. Where the staff questions the reliability of legal advice it should propose rules which will facilitate reliance on the advice of private counsel. With respect to the SEC no-action process, the staff should prepare a form, required to be utilized by counsel in rendering advice relating to registration obligations, which will provide a full representation to counsel, by the client, of sufficient pertinent facts to assure that counsel have adequate information to render such advice. Upon publication of adequate guidelines to interpretive positions, the Commission should adopt rules of practice providing for disbarment from Commission practice of counsel who render advice that is incompetent or in disregard of available interpretive positions.

(d) The Commission should adopt a policy of full disclosure and publication of all interpretive positions that arise from advice given in concrete cases on the basis of specific facts. In furtherance of that objective, it should assure that a full summary of facts and reasons is prepared, for later publication, concurrently with the rendition of advice in each case in which the position taken may be of significance as an interpretive guide. (Preferably, the summary should be prepared by the initiating branch attorney.) And the Commission should assure that senior personnel involved in the advisory process have adequate opportunity to prepare and review interpretive summaries and to engage in continuing review of interpretive positions adopted by the staff or agency looking to such disclosures.

2. *The need for public availability of no-action letters*

No-action letters, together with related staff memoranda and Commission minutes, constitute a large body of law that is unavailable to the public in a field in which relatively few illustrations of the concrete application of interpretive positions are available and in which misconceptions abound. Available releases are infrequent and general when compared to the range of internal precedents developed, and it is doubtful that releases will be developed at a rate comparable to the development of staff and agency thinking on specific questions. See discussion at pages 47–48, *supra*. Therefore, it is desirable that all statements of advisory positions which have the effect of a substantial assurance of protection from enforcement or disciplinary proceedings should be made public.

All advisory determinations that are of significant importance as a guide to interpretation should be published in a manner that will make them generally available to the practicing bar.

Specifically, this embraces all no-action positions that have been the subject of Commission action (but not matters dismissed by the duty Commissioner as unimportant) and all staff letters which, though not the subject of Commission action, are summarized for use by the staff or Commission. Publication of matters decided by the Commission should include the Commission Minutes and a full summary of facts and reasons; if such a summary is unavailable, the related staff memoranda should be published. And because agency personnel regard many staff letters as interpretive guides even though they have neither been summarized nor the subject of Commission action, such letters should be made available to the public, after an adequate delay period, in the Commission's public reference room.

There is a significant body of opinion, both within the agency and among members of the securities bar, which opposes publication of no-action letters. See appendices D and F. The primary concerns appear to be that public disclosure of private financial details discussed in such letters will discourage many potential applicants from utilizing the service; and that the frequent involvement of discretionary considerations in the decisional process may often render the letters misleading and unreliable as guides to interpretive positions.

While the Public Information Act, sections (a)(D) and (b)(C), probably requires the publication or availability of these materials, if disclosure would constitute a serious threat to the continued viability of the no-action process, or would be seriously misleading, it is possible that amendments to the Public Information Act should be recommended. However, no very persuasive case is made with respect to either contention.

The uncertainty that may result from publishing apparently inconsistent letters pales in comparison to the uncertainty resulting from the unavailability of concrete illustrations of the application of interpretive concepts. The analytical techniques required of counsel in considering such letters as interpretive guides is not different in substance from that required of counsel in many other interpretive exercises. Furthermore, by publishing related staff memoranda, in matters that go to the Commission, much of the uncertainty would be reduced.

In most instances, the needs of confidentiality may adequately be met by a combination of delayed publication and substitution of symbols or descriptions for identifying names and details. (See discussion in appendix B, pages 5–7; appendix C, pages 3–6). However, because all no-action dispositions relied upon by the staff as a basis for interpretive guidance are probably within the coverage of the Public Information Act, there is doubt whether such information should be kept confidential. Where specific information is within "confidentiality" exemptions of the Act, of course, there would be no objection to substituting symbols and descriptions. But it is impossible that the needs of no-action applicants for confidentiality would not adequately be met by substitutions only to the extent necessary to satisfy the exemptions provided by the Public Information Act. Unless that is demonstrated, however, all no-action determinations that are of significant importance as a guide to interpretation should be published, after an adequate delay period, substituting symbols and descriptions only to the extent necessary to comply with the exemptions for confidentiality available under the Public Information Act. All other no-action determinations should be available, in the form of the advisory letter, in the Commission's Public Reference Room after an appropriate period of delay.

Publication of interpretive positions arising out of no-action determinations should not, however, be viewed as precedent binding upon the agency. For that reason, any release announcing the recommended policy of general disclosure should also announce that published positions may be subject to withdrawal and reconsideration, and should prescribe a method for public withdrawal of specific summaries from the body of published positions. Similarly, the same release might indicate that qualifications to published positions may also be accomplished from time to time by means of published summaries of hypothetical cases designed to limit or qualify previously published positions.

Recommendation

All statements of advisory positions taken by the staff or agency which have the effect of providing substantial assurance against enforcement or disciplinary proceedings constitute the law of the agency. All such statements which reflect decisions by the agency, including agency minutes and interpretive summaries (or supporting staff memoranda), and all such statements by the staff which are of significant importance as a guide to interpretation, should be regularly published in a form generally accessible to the practicing bar, after removing identifying details to the extent such details are exempt from disclosure under the Public Information Act.

All other staff statements, of similar effect, after an adequate period of delay, should be made available in the public reference room of the agency.

This disclosure policy should be announced in a release which indicates the manner of proposed publication and further indicates that published positions may be subject to withdrawal or qualification, either by means of published withdrawal or by means of further advisory summaries based upon hypothetical statements of fact.

3. *The need for public availability of the considerations that guide discretionary judgments*

It is apparent from discussion with senior personnel, from the questionnaire responses of branch attorneys, and from an examination of specific no-action determinations, that a significant range of discretion is exercised in deciding whether to take a no-action position. This is particularly true in cases which present "close" interpretive questions. Yet there is little publicly available material to suggest the types of nonlegal or noninterpretive considerations that may affect the no-action determination.

While it may be difficult to recite fully all of the considerations that may affect judgment, or the precise impact of any given factor, experienced staff personnel could provide a general description of the nonlegal or noninterpretive considerations that are most frequently taken into account.

Recommendation

That the staff prepare a general release, stating that in determining whether to grant requests for no-action letters, in addition to technical problems of interpretation of controlling statutes and rules, certain other factors are taken into account. The statement should describe those considerations, and the effect they may have on the no-action determination, as fully as is feasible.

4. *The need for a published description of the no-action process and of the effect of issuance of a no-action letter*

Staff and Commission procedures in rendering no-action letters are relatively well defined. Yet published regulations, appendix K *supra*, provide inadequate information about the process. In particular, they provide virtually no information about the extent of authority accorded a no-action letter or the availability and extent of Commission review.

In view of the Commission's recognition of a practical "estoppel" based on such letters, some fuller explanation should be made of the authority they carry. And in view of the Commission practice of hearing or assigning to a duty Commissioner all matters in which a Commission hearing is asked, it is somewhat misleading to assert, as is suggested in Appendix K, that hearing may be had only where the requests "involve matters of substantial importance and where the issues are novel or highly complex."

Recommendation

That revised regulations be prepared for publication in the Code of Federal Regulations, more fully describing the no-action process, stating the legal effect of a no-action letter and setting forth the Commission's practice in hearing appeals from staff denials.

5. *Need to develop procedures that will assure applicants an opportunity to meet dispositive issues*

Present procedures in handling requests for no-action letters do not provide any assurance that the applicant will have an opportunity to understand the factual and legal issues that may be dispositive of his request. Generally the staff, by letter or informal conversation, makes reasonably clear what matters are in issue; but no procedures assure that understanding. Further, even upon a final determination the form of the no-action letter seldom states reasons which would assure that the applicant will understand the grounds for the conclusion.

While procedures for refining the factual and legal issues in a no-action matter would be unduly burdensome, it would seem that both of the above procedural difficulties could be met adequately by requiring that each letter be supported by a statement of reasons for the determination; or at least, that each negative determination be supported. In view of the flexibility of the no-action procedure and the possibility of further application to the staff in the event of misunderstanding, such a procedure should be adequate to assure that the issues and reasons are understood. And the burden of complying with that requirement should not be excessive provided the routine no-action requests are disregarded, as recommended *supra.*

Recommendation

That every letter responding to a request that the staff take a no-action position with respect to a specific application therefore include a statement of the facts; and that every letter denying such a request also include a statement of the reasons for denial of that request.

APPENDIX A

Letter from Chief Counsel, SEC Division of Corporation Finance, to Harry Balterman, Esq., April 12, 1965 (See ¶ 91,606).

DEAR SIR: In your letter of April 2, 1965, you ask certain questions as to so-called "no action" letters; that is, informal opinions rendered by this Division concerning the securities laws upon certain facts presented by individuals or their counsel.

Two of your questions are, in effect, whether a "no action" opinion of this Division is binding upon the Commission.

The Division acts in an advisory capacity to the Commission, and recommendations of the Division may or may not be accepted by the Commission. A "no action" letter merely represents the recommendation the Division would make to the Commission on the basis of the facts presented; it is not a formal administrative act of the Commission. The Division's opinion, of course, is predicated upon the assumption that the facts presented are a true and complete statement of all the circumstances surrounding the transaction in question and is of no effect unless the facts are as stated.

Professor Loss, in his treatise on securities regulation, puts the matter this way:

> "It is understood that the [no action] opinions represent the views of the officials who give them and are not binding upon the Commission. The official says, in effect: 'This is my view based on the facts as you describe them. You may not rely on it as if it were a Commission decision. If you don't like it, you are at liberty to disregard it and follow your own construction, subject to the risk that I may recommend appropriate action to the Commission and the Commission may institute proceedings or take other steps if the Commission agrees with my view.' Loss, Securities Regulation, p. 1895 (1961).

This is an accurate summary of the scope of a "no action" opinion. Such an opinion, therefore, is not binding in a court of law on the question of the liability of an issuer for permitting a sale of its securities without registration under the Securities Act of 1933, nor would such an opinion preclude an issuer from maintaining that a sale of its unregistered securities by a stockholder would be in violation of Section 5 of the Securities Act of 1933.

APPENDIX B

December 16, 1968.

Orval L. DuBois, *Secretary*
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

DEAR MR. DUBOIS: This is written in response to the Commission's request for comments on whether staff interpretive and no-action letters should be made available to the public (Release No. 33–4924).

It is not my intention to comment on the Commission's position as expressed in the Release that no-action letters and letters containing interpretive advice are not required to be made public under the provisions of the Public Information Act, 5 U.S.C. 552. In this connection, it is sufficient to note that under the provisions of that Act an agency may make records and documents available for public inspection, whether or not required to do so. My comments will be directed solely to the question of the desirability of making these documents available for public inspection.

Since I was the staff member in the Division of Corporation Finance charged with primary responsibility for writing interpretive and no-action letters during the period from January, 1965 to August, 1968, my situation is rather unique when compared to that of other persons who may submit their comments to the Commission. My exposure to the practitioners' problems relating to interpretations of the securities laws is rather limited, but my familiarity with the problems of the Commission's staff in this area is probably greater than that of any other practitioner. Accordingly, I expect that my approach in responding to the Commission's request for comments will differ rather substantially from the approach of other practitioners. In this connection, I shall feel free to make reference to particular experiences while I was a staff member, if such reference would be helpful in illustrating a point.

Initially I wish to mention several important factors relating to interpretive and no-action letters. First, I do not believe it is helpful for the purposes of the Commission's present request for comments to attempt to make a distinction between no-action and interpretive letters. There are situations in which a letter containing staff advice clearly falls into one or the other of the two categories, but these situations are limited. By far the more numerous are those situations in which it is difficult, if not impossible, to tell whether the staff advice is intended as an interpretation, or merely as a statement that enforcement action will not be taken if a specified transaction is consummated exactly in the manner described to the staff. It is difficult for the reader to make a distinction between the two types of letters because of the rather peculiar phraseology in which the letters typically are written, but more importantly because it is impossible for the reader to know what factors were, in the mind of the staff member who wrote the letter, determinative of the position taken by the staff. Also, it is not always clear to the staff member whether he intends that the letter constitute an interpretation or merely a statement that enforcement action will not be taken. This is particularly true in those instances where a request for staff advice is made on a set of facts which poses a close question and where the amount or value of the securities involved is not great.

An additional fact should be mentioned with respect to this point. It was my experience that normally when a request for advice was referred to the Commission (whether because the staff was requested to do so, or because the staff believed the matter was important or novel enough to bring to the Commission's attention), the Commission considered the question as one of interpretation of the securities laws. This was true even though the person who had requested the advice may have desired nothing more than an assurance that no enforcement action would be instituted if he engaged in the proposed transaction. Conversely, in some instances when the staff referred matters to the Commission as interpretive questions, the Commission disposed of them as if they were nothing more than requests for assurance that no enforcement action would be instituted. Perhaps the best example of this latter situation was the request, approximately two and a half years ago, for an interpretation of Rule 133; specifically, for a determination whether that Rule applied to a situation in which the constituent corporation was owned by two persons, each of whom held 50% of its stock. This request was presented to the staff as a request for an interpretation, and the staff submitted it to the Commission as a request for an interpretation. The Commission, however, disposed of the matter as if it were a request for a "no-action" letter, and without resolving the interpretive question; the attorney who submitted the question was advised that no action would be instituted if the proposed transaction were consummated. The Commission need not be reminded of the difficulties that followed this incident; it is sufficient to note that knotty interpretive problems concerning this aspect of the Rule continued with some frequency for almost two years. Furthermore, the attorney who submitted the matter subsequently was presented with an almost identical factual situation, and he confessed that he did not know what advice to give his client because he did not know what was the basis for the determination made by the Commission.

As the above discussion has indicated, although the staff may intend a particular letter to be merely a statement that on a given set of facts no enforcement action will be taken, it frequently happens that when a similar factual situation is presented in a subsequent request for staff advice, to some extent the previous letter is looked to as a guideline for the determination that should be made with respect to the subsequent letter. It is inevitable that this should happen, since the staff does conscientiously attempt to preserve consistency in the position it takes in its letters, but the result is that what the staff had intended to be only a statement that no enforcement action would be taken is converted by the staff into an interpretation. Finally, if a number of similar letters are written by the staff with regard to a particular subject, those letters (which now receive some distribution among certain members of the Bar) come to be regarded as interpretations whether or not the staff intended them to be such.[1]

Second, I believe that the writing of staff letters is a service that is often useful to the public, the Bar and the securities industry, and that every effort should be made to make the service more useful and to obtain for the Commission the maximum value from the efforts that are expended in providing this service. The basic purpose in having staff members devote a considerable amount of their time to the writing of these letters is to inform the public, the Bar, and the securities industry as to what are the views of the Commission, or its responsible staff members, regarding the application of the securities laws. The maximum ultility is not realized when the positions taken in those letters on important matters that may involve interpretive questions are given such little exposure as is the case under the present system. Furthermore, a large portion of the staff's time is being devoted to writing letters which do not involve vital interpretive questions. From the Commission's point of view, little of any significance is accomplished in furthering the overall administration of the securities laws and the Commission's rules when responsible staff members must devote a substantial amount of their time to writing letters which are not important. It is especially true today that the Commission cannot afford an uneconomical use of its staff's time and skills.

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[1] An excellent example of some of these phenomena is the history of staff advice concerning the application of the registration requirements of the Securities Act of 1933 to financing plans involving the issuance of industrial revenue bonds. Over a period of years prior to January, 1967, a dozen or so letters were written stating that no action would be recommended to the Commission if such plans were carried out without registration of any security under the Act. Although those letters were phrased as "no-action" letters, it is not at all clear that they were not intended by the staff to be interpretive letters. However, it was abundantly clear from the comments received on the Commission's proposal to adopt Rule 131 that members of the Bar and securities industry considered those letters to constitute interpretations, even when one makes allowance for the hyperbole that sometimes attends comments on Commission rule proposals.

I also wish to express my concern (which results from my experiences as a member of the staff) that the enormous volume of requests for staff letters, and the tendency for letters of little substantive content to crowd out the more important letters, will ultimately diminish the value of this service to a point where the Commission will no longer be justified in having its more senior and capable staff members write these letters, rather than devote their time to matters of more pressing concern to the Commission in its administration of the securities laws. Therefore, any disadvantages or inconveniences that may be associated with making staff letters available for public inspection must be put in their proper context in relation to the value the Commission can derive from the services of its staff if some change is made in the present procedures.

At page 3 of Release 33–4924, the Commission refers to the existing policy of not making staff letters available to the public as being based upon the belief ". . . that a member of the public should be able to obtain the advice of the Commission's staff without fear that information provided to the staff for that purpose might be made public in a manner that might adversely affect his lawful business activities or invade his personal privacy." This policy actually involves two separate considerations.

First, with regard to lawful business activities, there is no need for placing letters in the public files at a time when the business activities could be adversely affected. Indeed, at page 4, the Release quite properly reflects the realization that it would be desirable in these situations to delay publication of the letters until a time when there would be no undesirable impact. Publication could properly be delayed until the transaction involved has been consummated and thus has become a matter of public record, or until a time when it is clear that the transaction will never be consummated, or such other time as may be necessary to avoid an undesirable impact. There does not seem to be any criticism that could be applied to this approach.[2]

Second, with regard to personal privacy, the staff does receive a large number of requests for advice in which determinations must be made on the basis of an individual's personal circumstances. In these situations information concerning a person's financial circumstances, state of health, marital status and other rather personal matters is normally presented either in the initial request for staff advice or subsequently in response to questions asked by the staff. While it is quite understandable that an individual would not care to publicize information concerning these matters, the information frequently is already in the public domain for one reason or another. For example, if a person has had serious financial difficulties, or has been fired, or is in such a poor state of health that he cannot or is not allowed to work, or has had marital difficulties that culminated in divorce or is estranged from other members of his family, these facts, although perhaps not widely known, are not secret from the whole world. However, the placement of letters containing these facts in the Commission's public reference room would not be the equivalent of publishing them in a newspaper of general circulation, and any determination whether staff letters should be made available for public inspection should not be based upon the assumption that it would be. I do not foresee that there will be large numbers of persons waiting to inspect the staff's letters for the purpose of gaining knowledge of someone else's financial, medical or marital problems, and I do not know of any single incident in the Commission's administration of the securities laws that would indicate otherwise.

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[2] This would be true whether the Commission were to make staff letters available for public inspection voluntarily or pursuant to a determination that it is required to do so under the provisions of the Public Information Act. In this connection it should be noted that there is no provision in that Act which would require the Commission to make information publicly available at a time and in a manner which would cause harm to some member of the public.

At this point I think it is appropriate for me to mention that many members of the Bar and the securities industry have no idea of the volume of requests that are made for staff advice, or of the internal problems of administration that arise in providing this service. In particular, it is difficult for a person who has not had experience on the staff to appreciate the amount of time that must be devoted to answering even a routine request for staff advice. Accordingly, I think it is proper for me to suggest to the Commission that comments received from persons who do not indicate an awareness of those administrative problems should be given little weight by the Commission in its deliberation as to what course it should follow in the future. As I have noted, any disadvantages or inconveniences that may be associated with making staff letters available for public inspection must be put in their proper context and weighed against the obligation of the Commission to derive the maximum advantage from the services of its staff members. The Commission must assign priorities to its business, and if procedures can be adopted to decrease the amount of time devoted to writing staff letters and to free staff members to devote more of their time to other more pressing matters, then the Commission should adopt those procedures even if some minor inconveniences do result.

I would expect that some of the comments the Commission receives in response to the requests contained in the Release will be to the effect that if counsel is required to spread information concerning a client's business affairs or personal circumstances on a public record, he would be reluctant to request a staff letter and that, accordingly, the effect of making these letters available for public inspection will be to dry up the flow of requests, then making a useful service unavailable. In my opinion any expression of this kind of concern would be misplaced for two reasons. First, as I have already noted, making these letters available for public inspection in the Commission's Public Reference Room will not be tantamount to a wide-spread publication of a client's business affairs. There is no reason to suppose that these letters will be referred to by any persons other than those who have legitimate reasons for analyzing the staff determinations. Second, once the staff letters are available for public inspection, it will be possible for attorneys to use these materials as a basis for formulating advice to their own clients, thereby reducing the need for persons to write to the Commission and reveal to the staff business plans or personal matters which they would rather keep as confidential as possible. A person who is in need of advice concerning the application of the securities acts or the Commission's rules would then be in a position of being required to reveal this information only to his attorney, who would be in a better position to advise the client on the basis of publicly available materials. In short, once a sufficient number of staff determinations has been published and are available to the Bar, there will be no need for continuation of the existing flow of business and personal information to the Commission's staff.

From the point of view of the Commission, I do not think that the resulting reduction in the flow of this information to the Commission's staff would have any adverse impact. An argument might be made that information contained in requests for no-action or interpretive letters could be useful in connection with enforcement activities, but I do not believe such an argument has any merit. Aside from the fact that these procedures were not established for the purpose of providing enforcement information, I do not know of any case during my tenure as Chief Counsel of the Division of Corporation Finance when any information that was significant from the enforcement viewpoint was first learned by the Commission's staff as a result of a request for a no-action or interpretive letter.

On the basis of my experience on the Commission's staff, as well as my rather limited experience since leaving the staff, it is evident to me that there are widespread misconceptions among members of the Bar as to what the Commission's positions are on a large number of questions arising under the securities laws and the Commission's rules. Merely making staff letters available in the Public Reference Room will not be an adequate response to the problem of dispelling those misconceptions, since there is no way to assure circulation of all staff letters. Accordingly, I recommend that in addition to making all letters available for public inspection, the identifying details be deleted from letters that the staff considers important and those letters be published periodically by the Commission in its releases. Hopefully, the securities law services would reproduce the letters without identifying details, thus making the more important determinations available to anyone who is in a position to consult one of the services.[3]

Although I favor making staff letters publicly available and taking steps to disseminate the more important ones as widely as possible, I do no intend to suggest that by taking such steps the Commission will make all of its difficult interpretive problems disappear. The problems will continue for the reason that under the securities laws and the existing rules there are really no satisfactory solutions to many of them. This accounts for some of the changes in the Commission's position that do occur from time to time with respect, for example, to the application of Rule 133, the so-called "doctrine of fungibility, the question of who is a "person", or what is a "distribution," etc. I believe that these problems can never be solved to the satisfaction of everyone, and that consequently steps should be taken to avoid them in every possible situation. Since they cannot be avoided by adding additional complexities to an already complex statute and set of rules, I urge the Commission to take all possible steps to adopt procedures that are easy to comply with and that will provide an inexpensive way to sell securities under appropriate exemptions. I hope that the study being conducted by Commissioner Wheat will soon be completed and will recommend specifically a number of exemptive rules that can be used to avoid the complex problems that now exist.

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[3] In this connection, a few comments should be made regarding the releases the Commission has already published and which have been reproduced in the services. Those releases represent an important and commendable effort to give advice publicly on important questions. They are not as helpful as they could be, however, primarily because they contain general discussions of problems, and thus are only the beginning points of any really serious inquiries. They also have the disadvantage of being in the form of a textual material given to persons who are trained to read cases and to reason by analogy. What the Bar really needs for its guidance is readily available materials in the form of cases (i.e., individual letters to which the usual skills of a *lawyer may be applied.*) (Italic portion missing; added by hypothesis.)

I appreciate the opportunity the Commission has given to submit comments on the questions raised in its Release. Because of my rather unique situation, I have not attempted to incorporate the views of any other person, but have confined myself to expressing my own opinions.

Sincerely yours,
/s/ GEORGE P. MICHAELY, JR.,

APPENDIX C

ROBERT E. HONE
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October 24, 1968

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Re: Interpretative and No-Action Letters

DEAR SIRS: This is in response to the Commission's request in Securities Act Release No. 4924 (Sept. 20, 1968) for comment on the suggestions that interpretative and no-action letters be made "*publicly available*." On the assumption that the Commission will be sparing in publication, adoption of the proposal should be encouraged.

Nearly all interpretative and no-action letters relate to standard factual situations and thus are of little value as evidence of developments in federal securities law. Their publication, serving no useful purpose, would only add to the time that must be spent in study generally or in research on a particular problem. I would venture the estimate that not more than two or three letters, if that many, in each 100 issued by the Commission's staff tend to have any significance in the interpretative sense or as an indication of current trends in policy. I would urge again, as I have in the past, that these isolated letters be made "publicly available."

To repeat, the Commission should be extremely selective in choosing interpretative and no-action letters for publication. For example, I assume the Commission is still receiving numerous requests for no-action letters on the "control" issue. In the light of the material already available, the replies to these requests would add nothing of interpretative significance. It would be an extraordinary situation that would justify or warrant publication of a letter on the control issue.

Similarly, I am sure the Commission is still receiving numerous requests for no-action letters with respect to the much abused Section 4(2) of the Securities Act in which none of the indicia of a private offering, except perhaps lapse of time, is suggested by the facts of the case. The replies to these requests would be of no interpretative value. I see no reason why any of them should be published unless all of a sudden the Commission were to decide that lapse of time was not an indication of investment intent unless it amounted to four or five years, or, on the contrary, that an interval of six months or less was indicative of investment intent. In the absence of any such extraordinary development, the practitioner may make out by relying in appropriate degree on the various formal or informal comments by Commission personnel about the significance of one year, two years, or three years as indicators of investment intent—realizing, of course, that some of the comments before bar associations and similar audiences mentioning two years or three may be more "lore" than they are "law" as illustrated by Item 6 of Form S–14, S.A. Rel. No. 1862 (Dec. 13, 1938), or S. A. Rel. No. 4552 (Nov. 6, 1962).

One area in which it might be well to publish some no-action letters are those dealing with the "negotiated transaction" exception engrafted by interpretative letters onto the indefensible "no-sale" theory as presently set out in Rule 133. The publication of such letters would serve a dual purpose. It would bring the practicing bar up to date on the degree of vitality left in that involuted interpretation, and it might introduce an appropriate element of self discipline. The Division of Corporation Finance has wandered all over the range in recent years on this point. Either this exception is or is not appropriate. In any case, the Commission should at this late date take a firm position for the public record on the validity, desirability, and scope of the exception, or, if that is not feasible, at least publish from time to time the currently fashionable minimum number of stockholders required to take a proposed merger or sale of assets out of the exception.

Great restraint should also be exercised in publishing letters of comment (or portions thereof) on registration statements, but there could be some useful periodic supplementation of the infrequently revised guide (S. A. Rel. No. 4666).

Requests for interpretative or no-action letters should *not* be made publicly available. There are, I believe, several reasons why these requests should not be published. *One*, for the purpose of evaluating the significance of the staff reply to the request as evidence of current interpretations or as an indication of current policy the information furnished by the applicant is irrevelant; the important thing is what the staff deemed to be the facts of the case—and that is to be determined by what is stated in the staff reply and not by what appears in the request. *Two*, to make the requests publicly available would add materially to the job of researching to determine current law or policy without the contribution of evidentiary material of any real value. *Three*, the publication of significant staff letters without making the requests public might encourage an important self discipline on staff lawyers similar in substance to that resting upon judges and also upon anonymous lawyers in public service who draft the interpretation which are published as "Opinions of The Attorney General." The staff lawyer will know that the letter which he prepares, either for his own signature or that of a superior, will stand or fall on its own inherent merit. It will have to be carefully written and will have to state accurately and briefly the material (i.e., the legally significant) facts. Pride of authorship is to be encouraged. On occasion staff letters are not as carefully thought out and drafted as one might wish, but, by and large, they are superior in quality to the general run of the requests therefor.[4] I believe it would be most unfortunate if we were to be burdened with the necessity of wading through the verbose and often poorly drafted requests which the Commission receives for interpretative and no-action letters.

Release No. 4924 seems to demonstrate on the part of the Commission a hypersensitive approach to the problem of confidential information. Publication of interpretative and no-action letters ought not involve any problem with respect to the release or premature release of confidential information greater than that which the Internal Revenue Service faces in publishing its weekly bulletin. The rulings published in the IRS Bulletin are quite similar to SEC staff letters. For example, they describe elaborate and important financial plans or proposed transactions in detail and set forth the impact thereon of the Revenue Code. Arbitrary symbols are substituted for the names of companies and for the amounts (of dollars or securities) involved. Similar editing should be feasible for the SEC, except that in some instances reasonably close approximation of the amounts of securities involved or of the number of offerees or purchasers might be necessary. The omission of corporate names and the necessity on occasion of substituting approximations for accurate figures should not involve any "considerable costs" or involve the risk of rendering "meaningless if not affirmatively misleading the edited staff responses.

For the purpose of giving adequate confidential treatment to a proposed transaction or at least for the purpose of avoiding premature publication of information concerning a proposed transaction, it might be well to have an arbitrary policy of not publishing an interpretative or no-action letter until a fixed period of time after its issuance. A period of two months should ordinarily be sufficient.

There may well be isolated cases in which it would be undersirable for the interpretative letter or no-action letter to be published as soon as two months after its issuance or possibly at any time in the future. I do not believe it would be feasible to take care of these cases by entertaining requests for confidential treatment. Without doubt the confidential treatment technique would be abused, and a great many requests for no-action letters would unnecessarily contain a supplemental request for confidential treatment thereby throwing an additional, collateral and unprofitable burden on the Commission's staff.

If, in a particular case, a lawyer believes he must consult with the staff on an interpretative or policy issue and that publication of the staff reply would reveal confidential information which would be detrimental to his client, he should be content (i) to seek a conference with the appropriate staff member to discuss the interpretative or policy problem, (ii) to submit a memorandum of the material facts but not a letter or request for a no-action letter, and (iii) to accept the oral comments of the staff member on the problem in lieu of an interpretative or no-action letter. This procedure would serve as a restraint on lawyers and discourage them from making unnecessary requests for confidential treatment. If the Commission decides to experiment with this procedure, it might be well to require the lawyer seeking the conference to submit a conference memorandum to the staff within a few days after the conference so that the staff member participating in the conference will have some assurance that there was no unfortunate misunderstanding with respect to the significance of his remarks at the conference.

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[4] The Division of Corporation Finance seems to have curbed the practice quite common some years ago of retyping the applicant's statement of facts on the Commission's stationery and appending thereto a no-action recital. It is, therefore, disquieting to find the Chairman of the Commission referring to this abomination as though it were a routine and acceptable practice (see Panel Discussion, Public Information Act and Interpretative and Advisory Rulings, 20 Admin. L. Rev. 1, 30 [1967]) rather than a regrettable and temporary makeshift response to an excessive workload. The administrative vice in this practice is the creation of a record which does not show that the responding staff member was, in fact, aware of the significance of the information submitted; but perhaps that is less important than the loss of professional pride inherent in any such anthill process.

There is some vague language in Rel. No. 4924 that should not be passed over without comment. The release repeatedly refers to making interpretative letters and no-action letters "*publicly available*" without indicating in any way what that means. It would be an outrage to do no more than to make such letters "publicly available" by placing copies thereof in the public reference room. If it is decided that such letters should be made "publicly available," they should be published periodically, preferably not more than once a month on a predictable date, as a release, as a separate bulletin by the Government Printing Office, or as part of the SEC News Digest. Of these three, it seems to me that separate publication as a bulletin by the Government Printing Office (perhaps quarterly) would be preferable, although publication from time to time in the manner illustrated by I.C. Rel. No. 5510 (Oct. 8, 1968) would be satisfactory.

Release No. 4924 sets forth the following as an objection to making interpretative and no-action letters "publicly available":

> "* * * the danger also exists that undue significance might be attributed to the positions reflected in no-action and interpretative letters by persons overlooking the context in which they were given, particularly if all relevant facts are not included or policy considerations are not articulated. Some persons also might not appreciate the fact that not all no-action letters reflect an interpretation of the statute or rules, since in some instances no interpretation is involved but merely in the expression of a judgment with respect to conforcement policy."

Federal securities law is a fairly complicated matter with respect to which careful laymen might prefer to seek the advice of counsel. Those who do not are in far more danger of misunderstanding the statutes and the regulations than they are of misunderstanding staff letters. In brief, in speaking of "some persons not appreciating the significance of staff letters, the Commission is, in substance, speaking primarily of the practicing bar, and the fair inference to be drawn from the above quoted statement is that there is a danger lawyers are more apt to give incorrect advice if they have access to staff letters than if they are wholly ignorant of the content of such letters. I don't believe the five Commissioners, whatever their private views may be, would wish consciously to invite any such inference.

Release No. 4924, without direct attribution, quotes the Chairman as saying:

> "A no-action letter may, in fact, be an interpretation of the statute; most often, however, it is something entirely different. It may be a policy decision in a particular case, after considering the priorities and problems before the agency, the manpower available [and] the effects on the public . . . , whether it is necessary to crank up a proceeding if someone should proceed in the manner suggested."

The quantitive implications in that quotation do not really allow for the fact that quite frequently interpretations masquerade as no-action letters, and on occasion with unfortunate results. The no-action letter actually has been, in many instances, in the past a technique for avoiding decisions or for performing the necessary analysis to be assured that the conclusions reached are legally sound. I would hope that a revision of policy leading to the publication of staff letters would lead to a decrease in the number of no-action letters which are in fact interpretations masquerading as policy decisions and to a more effective articulation of the legal theories involved.

Release No. 4924 quotes Professor Kenneth Culp Davis as stating that "* * * some of the most important law of the SEC is embodied in this big batch of no-action letters. This is law. The interpretations are law." The quoted comment was made by Professor Davis at the Panel Discussion on the Public Information Act and Interpretative and Advisory Rulings on April 7 and 8, 1967 (20 Admin. L. Rev. 1, 29). The Commission goes on to state in Rel. No. 4924 that it "* * * does not agree that this much significance should be attached to the views expressed by the staff * * *." This is a substantially milder statement than the response made by the Chairman of the Commission to Professor Davis at the aforementioned panel discussion:

> "This is not secret law. It is true however it may be lore, l - o - r - e, but it is not law, 20 Admin. L. Rev. 1, 29 (1967)".

I doubt there is anything in the history of Anglo-American law or in the history of the Securities and Exchange Commission that would tend to support the proposition that such letters are not law. Interpretative letters are law in much the same sense as an opinion of the Attorney General or a decision by a District Court of the United States is law. The important point is the degree of authority inherent in an interpretative letter. They are not perhaps as authoritative as a District Court opinion or even an opinion of the Attorney General. They are not binding on the Commission or the staff in subsequent cases. The Commission and the staff should not and do not hesitate to overrule those letters that experience demonstrates to have been erroneous or unwise. Certainly and obviously such letters are far less authoritative than opinions issued by the Commission in formal proceedings. All of these limitations should be obvious to lawyers who find administrative law a part of their practice. In fact, it would not be demanding too much to expect lawyers also to understand that opinions issued by the Commission in formal proceedings (e.g., the *Unity Gold* opinion, 3 SEC 618 [1938] or the *duPont* opinion, 34 SEC 531 [1953]) cannot be effectively overruled by no-action letters emanating from the Division of Corporation Finance or the Division of Corporate Regulation.

In brief, it is hoped the Commission will adopt a definite policy of publishing significant interpretative letters; that it will be highly selective in such publication; that such policy will lead to a substantial decrease in the number of applications for interpretative or no-action letters; that the decrease in this part of the workload will result in a substantial improvement in the quality of interpretative letters including incorporation therein of some traces of the legal reasoning connecting the facts with the conclusion; and that the controversy over the question whether such letters are "law" will effectively impress the Commission and its staff with an awareness that the staff lawyers preparing these letters are performing an essential and important judicial function in responding to applications.

Very truly yours,
/s/ ROBERT E. HONE.

APPENDIX D

WILLIAM B. MATTESON
Chairman
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New York 10022
PL 2-6400

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York 10036

Committee on Securities Regulation

October 31, 1968.

Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D.C. 20549

Securities Act of 1933
Release No. 4924

DEAR SIRS: This letter is submitted by the Committee on Securities Regulation of the Association of the Bar of the City of New York in response to the "Request for Comments on Whether Staff Interpretative and No-Action Letters Should be Made Available to the Public," as contained in the abovementioned Release.

The Committee on Securities Regulation represents a large segment of that portion of the Bar of the City of New York which deals on a regular basis with the Commission and its staff. As such, the members of the Committee are keenly interested in maintaining and developing channels of communication with the Commission and its staff in order that they may more effectively advise and protect their clients. In the past, informal interpretative assistance by the staff of the Commission has been most helpful in this regard, and the Committee would be opposed to any change in practice which would inhibit or cut down this assistance in the future.

In general, it is the consensus of the Committee that there is no general dissatisfaction with the present practice of issuing interpretative and no-action letters on a non-public basis. Moreover, the publishing by the Commission from time to time of releases on significant interpretative or policy questions, or summarizing in general interpretations given by members of the staff, or dealing with policies and procedures pursued by the staff in administering the Federal securities laws, has been of great value. We note with interest the statement in Release No. 33–4924 that this policy will be "increasingly pursued" in the "months ahead." However, we strongly urge that whenever possible or appropriate an opportunity be given to the members of the bar and to the public to review and comment on any releases of general interest before they are adopted.

In the opinion of the Committee, the drawbacks of publication of interpretative and no-action requests and replies outweigh the possible advantages to be gained from such publication. Thus, the Committee would be against making interpretative and no-action letters generally available to the public.

On the other hand, the Commission might consider, in conjunction with stepping up its program of issuing general releases, the issuance from time to time of releases summarizing some of the factual situations presented and interpretations and positions taken by the staff in significant past interpretative and no-action letters (without disclosing identifying facts or names). If this is done, we would hope that it would include positions which were favorable as well as unfavorable to the applicant. In this way, some of the more important and perhaps more helpful examples of positions taken by the staff could be made known without running into the difficulties and problems arising from publishing all letters indiscriminately. (The Commission may, to some extent, have anticipated this suggestion, as indicated by Investment Company Act of 1940 Release No. 5510, issued October 8, 1968).

While we think the Release touches on the major considerations pro and con publication of interpretative and no-action letters, it may be helpful to refer to those that in our view militate most strongly against a change in the Commission's practice.

Interpretative and no-action letters from the Commission containing rulings on specific facts by the staff of the Commission will often be confusing and misleading unless tempered with many more caveats and much more reasoning than normally is found in interpretative and no-action letters from the staff. Moreover, there is no question in our mind that "writing for the public" would not only inhibit requests but justifiably inhibit the number of cases in which the Commission would be willing to issue replies. From the applicant's point of view, we feel strongly that many business transactions could not be the subject of an interpretative or no-action request if the facts automatically became part of the public domain. Moreover, the facts detailed in a no-action letter may not be those which the individuals involved (including those not involved in the application) want, for personal reasons, to receive wide publicity.

We agree that interpretative and no-action letters are presently effective methods for assisting the bar and the public and for administering the laws by the Commission. We agree that a denial of a no-action letter or an adverse interpretation will inhibit action contrary to such advice as the parties involved are put on notice that they will face opposition by the Commission. Moreover, if litigation subsequently develops, the fact of prior negative advice from the staff of the Commission will undoubtedly influence the court in making its decision. Any change in practice which would decrease the opportunities of the Commission to pass on fact situations before they happen would, in our view, be detrimental.

We do not believe that the non-public nature of these letters violates any concept of fairness in dealing with the public. All members of the public are equally in a position to ask for an interpretative or no-action letter. As to apprising the public and the bar of the law, we would rather rely on the Commission (often upon the urging of private practitioners and bar association committees) to publish general statements of policy and interpretations where they are needed or would be helpful. In our view this should be adequate to disclose the "law."

We do not agree that publication of the letters will make people more candid in setting forth the details of a transaction. Quite the contrary, we would think that lawyers would be constantly pressed by their clients to disclose no more information than is absolutely necessary, if the information disclosed was automatically made public. No client likes to see his private business dealings spread over open documents or in the newspapers.

As to work load, it has always been within the discretion of the staff of the Commission to refuse to issue interpretative or no-action letters. We think it is within the discretion of the Commission to discourage requests where they are unnecessary. Administratively, the Commission might want to consider simplifying the form of its reply to requests by such devices as not restating the facts contained in the request letter. Publication of interpretative or no-action letters would, in our view, only increase the burden on the Commission as the wide dissemination of such letters would demand much more in the letters in the way of reasons for the Commission's position than is now often included in such letters.

We do not consider a delay in publication to be an answer as the private nature of some of the inquiries does not always change with time. Moreover, the suggestion to cull identifying facts and names out of the correspondence would not only be tremendously time consuming for the staff, but could be very misleading in the final product.

To summarize, the Committee is of the opinion that on balance the publication of interpretative or no-action requests might well destroy the useful channels of communication now open between the staff of the Commission and the bar and the public. Moreover, it would tend to reduce the flexibility of the staff's administration of the law and its ability to deal with the many difficult and diverse questions presented to it. Thus, we urge the Commission to adhere to its long-standing practice of non-publication of interpretative and no-action letters.

Respectfully submitted,
/s/ WILLIAM B. MATTESON
Chairman.

APPENDIX E

MEMORANDUM IN RESPONSE TO LETTER OF JULY 8, 1968, FROM WARNER W. GARDNER RE NO-ACTION LETTERS

1–2. *Volume of business and complexity or difficulty of issue.*

No precise statistics are kept of all no-action letters. The great bulk of these is issued by the Division of Corporation Finance, which estimates that these letters are currently being issued at the rate of approximately 5,000 per year (in that Division letters rarely take the form of an interpretation as such). The Division of Corporate Regulation sent out approximately 640 letters of interpretation or no-action letters during fiscal 1968, of which less than 20% were no-action letters. That Division also estimates that during that period it has given as many as 4,000 telephone responses to inquiries involving interpretations of various sections of the acts and rules and regulations thereunder. The Division of Trading and Markets has issued approximately 400 interpretations and no-action letters during the past fiscal year. Inquiries as to interpretations are also answered by our regional offices, but these normally relate to generally well-settled interpretations and rarely take the form of a no-action position.

The issues involved range from relatively simple questions that can be answered in a matter of moments to questions involving highly complex facts and extremely troublesome problems. Because of this, case load figures would probably not be very meaningful and for the most part no such statistics have been kept.

3. *How the matter arises.*

There is no statutory requirement that the Commission's staff provide members of the public with no-action letters. As a public service, however, the staff provides such letters upon request by members of the public for *ad hoc* determinations of whether, with respect to the particular facts presented, the staff will or will not recommend enforcement action to the Commission.

4–5. *Basis of action and availability of sources therefor.*

No explanation of favorable action is usually sought or given and normally no more than a very general explanation, if any, is given for unfavorable action. No-action requests are granted or denied on the basis of the staff's interpretation of the statutory provisions and rules involved, relevant court and Commission decisions, and Commission releases to the public. In addition, consideration is given to the position taken in previous no-action letters and whether or not there appears to be a possibility of injury to the investing public if the proposed activity is undertaken. Except for the latter two categories, all of these sources, of course, are available to the applicant.

From time to time the Commission has made public interpretative summaries of particular areas of the securities laws. See examples attached. In the past it has been felt that it was not feasible to make no-action letters publicly available. Normally it was believed that the applicant felt the facts contained in his request would be treated as confidential, and in some instances disclosure of the information might have an unwarranted effect on the stock market. Moreover, taken out of context the no-action letter in some instances might be misleading; and if the letter had to be made public, there might be greater delay in its issuance in order to include additional background material that might be deemed necessary to eliminate possible misunderstanding. Similar considerations it has been felt apply to digests of such letters that have been kept for staff use. Another consideration in not making no-action letters public has been the belief that these letters assisted in enforcement of the statutory provisions by advising the staff in advance of activities that might be questionable; if the letters were to be made public, it was feared this procedure might be discouraged.

The Commission is about to undertake, however, to publish for public distribution on a periodic basis summaries of the more important staff rulings. In addition, the Commission is giving active consideration to the possibility of making future letters responding to no-action requests public.

A comprehensive digest of past staff rulings does not appear to be feasible, since indices now used by the staff are at best helpful only if the letters referred to are available and because the manpower required to make a useful public digest could be spent on much more important things.

6. *"Evidence" on which staff acts.*

In reaching its decision on a no-action request, the staff normally relies on the material submitted by the applicant. If the staff is in possession of reliable information which raises a question as to the good faith of the applicant, it may refuse to give a no-action letter and may or may not advise the applicant of the reason for such refusal, depending upon whether or not there is a pending investigation.

7–9. *The process of decision and review procedures.*

A recommendation in a no-action matter is normally initially drafted by a staff attorney and is then reviewed by one or two senior staff members.

The final decision on a no-action request is reached by staff members at the senior staff level (GS–14, –15 and above, often the division's chief counsel).

In effect, the Commission has provided for a limited review on its own motion in a no-action matter through standing instructions to the staff that novel matters or questions involving important policy determinations are to be referred to the Commission, along with a recommendation of the referring division. Upon receiving unfavorable advice from the staff on a no-action request, the applicant may always request that the matter be referred to the Commission for a review by it, on policy or legal grounds, of the determination reached by the staff, and the Commission will, on occasion, review the matter. The Commission might reach its decision immediately or might require several weeks.

The applicant normally presents his views to the staff by letter; but, at the applicant's request, this may be supplemented by a conference prior to the staff's determination.

The length of time required to reach a decision ranges from several minutes to several months—depending upon the difficulty of the questions involved, whether the issues presented are so novel or complex that the staff deems it appropriate to advise the Commission of the disposition the division proposes to make, and any attendant urgency.

Attempted intercession by members of Congress is very rare.

8. *Attitude of decider.*

The no-action letter procedure is used to assist persons to comply with the law in prospective transactions, to discourage unlawful transactions, and to assist in effectuating transactions that do not appear to be contrary to the intent of the statutes and rules. With respect to a particular request, any or all of these considerations might be involved.

10. *Availability of judicial review.*

No judicial review is available from the denial of a no-action request, as such, because the denial is essentially the informal advice of the staff that should the applicant undertake the proposed activity the staff may recommend that the Commission take enforcement action. While it is by no means clear, it has been held that the Commission may grant a declaratory judgment with respect to the type of question that often arises in a no-action request.[5] Except in rare situations the Commission is not required to do so,[6] but if it should, there would, of course, be judicial review. Otherwise the position of the staff could be tested only by an enforcement action brought by the Commission should the applicant ignore the staff's advice.

11. *Formulation of staff advices into regulations.*

In view of differing facts involved in each no-action request, it is often impossible to formulate meaningful regulations that will take care of such matters; but where particular questions are frequently presented for no-action consideration, if possible the advice generated by the question may be formulated into a regulation.

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[5] U.S.C. 554(e) [formerly Sec. 5(d) of the Administrative Procedure Act]; *First Savings & Loan Association of the Bahamas, LTD.* v. *Securities and Exchange Commission,* 358 F.2d 358, 360 (C.A. 5, 1966). But see *Attorney General's Manual on the Administrative Procedure Act* 59 (1947).

[6] Certain statutes administered by the Commission provide for declarations of status. See, *e.g.,* Public Utility Holding Company Act of 1935, Sec. 2(a)(7)(B).

APPENDIX F

For release Friday, September 20, 1968

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

SECURITIES ACT OF 1933
Release No. 4924

SECURITIES EXCHANGE ACT OF 1934
Release No. 8410

HOLDING COMPANY ACT OF 1935
Release No. 16166

TRUST INDENTURE ACT OF 1939
Release No. 253

INVESTMENT COMPANY ACT OF 1940
Release No. 5494

INVESTMENT ADVISORS ACT OF 1940
Release No. 229

REQUEST FOR COMMENTS ON WHETHER STAFF INTERPRETATIVE AND NO-ACTION LETTERS SHOULD BE MADE AVAILABLE TO THE PUBLIC

There have recently been suggestions made that interpretative advice and "no-action" letters provided by staff officials of the Commission to inquiring persons should be made publicly available.[7] The Commission has been weighing the advantages and disadvantages of following such a procedure and would appreciate receiving the comments of interested persons.

Initially, the Commission notes that under its interpretation of the Public Information Act, 5 U.S.C. 552, this information is not required to be made public. That Act requires "those statements of policy and interpretations which have been adopted by the agency" to be made available for public inspection and copying, 5 U.S.C. 552(a)(2)(B), and provides generally that identifiable records of an agency must promptly be made available to any person upon request, 5 U.S.C. 552(a)(3). The Commission has by rule described the means by which the Commission itself may, in its discretion, provide informal policy and interpretative statements upon request, but has made clear that "opinions expressed by members of the staff do not constitute an official expression of the Commission's views. . . ." 17 CFR 202.1(d). Furthermore, the rule adopted by the Commission to implement the Public Information Act, in reliance upon an exemption from its provisions, 5 U.S.C. 552(b)(4), at present provides that "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential, including . . . [i]nformation obtained in connection with interpretative letters or no-action letters which is deemed to have been submitted in confidence unless the contrary clearly appears" will not generally be published or made available to any person. 17 CFR 200.80(c)(4).

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[7] See, Remarks of Professor Kenneth Culp Davis, Panel Discussion, Public Information Act and Interpretative and Advisory Rulings, 20 Admin. L. Rev. 1, 28–29 (1967); Report of Committee on Public Information, 5 Annual Reports of Committees, Section of Administrative Law, A.B.A. 74 (1968).

We also note that the Commission has an established policy of publishing from time to time releases which state its views or those of responsible members of its staff with respect to significant interpretative or policy questions arising under the Acts which it administers, or reflect and summarize interpretations which have been issued by the staff with respect to various matters, or state the procedures and policies pursued in the administration of various aspects of the Federal securities laws. It is intended that this policy will be increasingly pursued in the months ahead, regardless of what decision is ultimately reached with respect to the availability of staff interpretative and no-action letters.

The informal advice given by members of the Commission's staff to the public frequently takes the form of interpretative letters and no-action letters.[8] The former, of course, are opinions of the application of the law to contemplated factual situations. In a no-action letter, an *authorized* officer of the Commission's staff may state with respect to a specific proposed transaction that the staff will not recommend to the Commission that it take enforcement action if the transaction is consummated exactly as it has been described.[9]

In the past, neither interpretative letters, no-action letters, nor the inquiries upon which they have been based have generally been made available to the public. In part, this policy has been based upon a belief that a member of the public should be able to obtain the advice of the Commission's staff without fear that information provided to the staff for that purpose might be made public in a manner that might adversely affect his lawful business activities or invade his personal privacy. Untimely disclosure of information might also prejudice the interests of others and in some instances could have an unwarranted impact upon the public securities markets. The willingness of the staff to state its position with respect to particular proposed transactions has undoubtedly promoted compliance with the statutes by reducing uncertainty and by deterring persons from consummating transactions which they might otherwise proceed with in the mistaken belief that no enforcement action would be called for. If fear of public disclosure should reduce the flow of requests for such letters, certain of these benefits might be lost. The danger also exists that undue significance might be attributed to the positions reflected in no-action and interpretative letters by persons overlooking the context in which they were given, particularly if all relevant facts are not included or policy considerations are not articulated. Some persons also might not appreciate the fact that not all no-action letters reflect an interpretation of the statute or rules, since in some instances no interpretation is involved but merely the expression of a judgment with respect to enforcement policy.

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[8] Part 202 of Title 17 of the Code of Federal Regulations describes the informal and other procedures that may be employed by members of the public in dealing with the Commission. Section 202.2 pertains to prefiling assistance and interpretative advice, noting that inquiries may be directed to an appropriate officer of the Commission's staff.

[9] "A no-action letter may, in fact, be an interpretation of the statute; most often, however, it is something entirely different. It may be a policy decision in a particular case, after considering the priorities and problems before the agency, the manpower available [and] the effects on the public . . ., whether it is necessary to crank up a proceeding if someone should proceed in the manner suggested." Panel Discussion, Public Information Act and Interpretative and Advisory Rulings, 20 Admin. L. Rev. 1, 24 (1967).

On the other hand, it has been stated that "it would seem anomalous that an agency which embraces disclosure as a fundamental philosophy should adopt a flat non-disclosure policy with respect to administrative determinations it generates," [10] and it has been contended that ". . . some of the most important law of the SEC is embodied in this big batch of no-action letters. This is law. The interpretations are law." [11] While the Commission does not agree that this much significance should be attached to views expressed by the staff, it may nevertheless be true that practitioners might find these letters helpful, even if available in a modified form, as, for example, with identifying details deleted. Further advantage of public disclosure may result from the fact that some persons may be less than candid in purporting to provide the complete and accurate information requested by the staff; if a procedure were adopted by which all requests for no-action and interpretative letters were made public in the form in which received, it is argued that this would be less likely to occur. Another possible advantage of public disclosure might be that of discouraging unnecessary requests. The Commission's staff has been faced with a growing volume of requests for no-action and interpretative letters and has found it increasingly difficult to devote to each the degree of analysis it deserves. It may be that the informal advisory procedures are increasingly being employed by attorneys as a substitute for their own examination of applicable precedents and other materials from which an attorney may and should be able to draw his own conclusions without imposing upon the time of the Commission's staff and that in such situations public disclosure of their requests might serve to discourage them. It is argued, however, that even full public disclosure may not be considered too high a price to pay for the expert views of the staff on novel questions of law or on the application of existing principles to novel or unusually complex factual situations.

In light of the foregoing factors, it appears to the Commission that the legitimate concerns that suggest the necessity for public disclosure on the one hand and those which on the other hand would seem to militate in favor of the present policy of non-disclosure are largely related to interests of members of the public. Indeed, an attorney who may today seek the fullest possible access to statements previously made by the staff to other persons, as well as the facts upon which they are based, may tomorrow vigorously resist public disclosure of the facts related to his own client's inquiry. From its viewpoint, the Commission is satisfied that neither administrative necessity nor convenience compels either adherence to or rejection of the present policy of non-disclosure.

An approach that has been suggested to, and which is under consideration by, the Commission would be the public disclosure of all interpretative and no-action letters, and the requests to which they respond, but only after an appropriate length of time has elapsed—such as two or three months. It is argued that this would eliminate the possibility in many cases of a premature public disclosure of the facts involved in the requests when such disclosure might adversely effect significant lawful interests and might thus permit full and unabridged disclosure of both inquiry and response. Such a procedure could be made flexible to provide that disclosure in an appropriate case could be accelerated or delayed.

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[10] Report of Committee on Public Information, 5 Annual Reports on Committees, Section of Administrative Law, A.B.A. 74, 78–79 (1968).

[11] Remarks of Professor Kenneth Culp Davis, Panel Discussion, Public Information Act and Interpretative and Advisory Rulings, 20 Admin. L. Rev. 1, 29 (1967).

This approach would assure the fullest practicable disclosure of useful information and would have the additional advantage of ease of operation—a significant factor at a time of budgetary limitations and manpower reductions. Those benefits would be obtained, however, by denying confidential treatment to persons seeking advice in all but the most exceptional cases—a result which, it is argued, may significantly impair the usefulness of the informal procedures to members of the public.

As indicated above, consideration has also been given to the possibility that the inquiries received from members of the public might be retained in confidence while the no-action or interpretative letters written by the staff are made available with identifying details deleted. But it would appear that such an attempt to afford confidential treatment may, at considerable cost, render meaningless if not affirmatively misleading the edited staff responses.

To some extent, no-action requests stem from uncertainty as to the correct legal answers to particular problems. Some measure of uncertainty is inevitable in the application of general propositions to concrete cases. The Commission has in the past attempted through rule making and other efforts to reduce the extent of the area of uncertainty. At the moment, a broad study of disclosure policy is underway at the Commission. It is hoped that these steps will, in time, reduce the need for no-action letters in particular fact situations.

All interested persons are invited to submit their views and comments, in writing, to the Securities and Exchange Commission, Washington, D.C. 20549, on or before November 1, 1968. Such communications will be considered available for public inspection.

By the Commission.

ORVAL L. DUBOIS
Secretary.

APPENDIX G

COMMENTS OF STAFF OR COMMISSION DEMONSTRATING RELIANCE UPON INTERNAL PRECEDENTS IN STAFF MEMORANDA TO THE COMMISSION OR COMMISSION MINUTES ON NO-ACTION MATTERS

Minute date:	*(Blanks substituted for identifying details.)*
6/5/67	"Action was deferred, it being understood that the staff would prepare a memorandum for the Commission's consideration setting forth the facts and circumstances involved in previous cases of this type where 'no-action' letters had been granted." (Commission minute.)
5/15/67	"Based upon the opinion expressed in our letter regarding ________ Stock (memorandum dated July 19, 1966 and Commission minute dated July 21, 1966) and similar cases the Division recommends that the request for a 'no-action' letter be granted." (Staff memo of 5/10/67 in connection with Commission minute of 5/15/67.)

6/12/67 Request for exemption from prospectus delivery requirements: "The Commission approved similar requests for exemption from the requirements of Rule 425A and Section 4(3)(B) in connection with the following registration statements: [Listing 9 cases under various file numbers.] (Staff memo.)

6/19/67 (*From commission minutes*):

"Mr. Michaely reviewed the circumstances of the request for the 'no-action' letter, as set forth in the Division's memorandum of June 7, 1967; expressed concern over the precedential effect which a 'no-action' position in the instant case might have, but indicated that he would not recommend a Court action to enjoin a sale; and stated that, under the particular circumstances of the case, the Division proposed to advise counsel for the trustees that, if they wished to withdraw the request for a 'no-action' letter in the matter, they should proceed to do so and the request would be deemed withdrawn."

8/15/67 "The question was presented whether the recipients of the ______ shares would be free to sell the stock without registration under the Securities Act of 1933 pursuant to provisions of Rule 133 thereunder. The Commission declined to authorize the issuance of further 'no-action' letters in situations such as this pending a reconsideration of past rulings and interpretations in this area and the issuance by the Commission of further or amended rules."

9/7/67 "We believe that the instant request may be distinguished from the recent no-action request of ______, former Board Chairman and President of ______ Corporation which was denied by the Commission on April 3, 1967, upon recommendation of this Division. [Goes on to distinguish on question of control] (Staff memo, September 4, 1967.)

Same Case "Unlike the ______ situation adequate information concerning ______ is in the public domain as the company is subject to FCC jurisdiction and files periodic reports with this Commission pursuant to Section 13 of the Sec. Ex. Act." (Staff memo, September 4, 1967).

9/13/67 Commission's comment after accepting Division's recommendation of denial: "However, the Commission indicated that it does not necessarily accept the arguments as articulated in the memorandum, particularly the discussion with respect to mergers." (Commission minute.)

11/8/67 "The Division and the Commission have generally taken the position that when an individual who has purchased securities for investment subsequently dies, a sale of such securities by his estate is not inconsistent with the decedent's investment intent . . . 1 [Footnote].

Footnote 1 reads:

[1] In Estate of ______, Commission Minute July 23,

1962, and Estate of ______, Commission Minute February 4, 1963, upon the Division's recommendation, the Commission held *inter alia*, that death was a change of circumstances sufficient to justify the sale by the decedents' estates of securities which the decedents had acquired for investment." (Staff memo.)

11/27/67 On presentation of *general counsel* Commission approved "no-action" position (rather than requested declaratory order)—reluctantly in view of some conflict with *Guild Films. Then* said:

"This determination should not be taken as a reflection of the Commission's position in other similar situations not involving pre-*Guild Films* undertakings and commitments." (Commission minute.)

12/22/67 "The Commission has approved numerous similar requests for exemption from the requirements of Rule 425A and Section 4(3)(B) in connection with registration statements of various Canadian governmental filings." (Staff memo.)

1/22/68 "The same questions that are presented by this request were last considered by the Commission on August 17, 1964, in connection with the request by ______ Company for a no-action letter covering a proposed sale of . . . ."

"In [that] matter the Division took the position that the shares were an unsold allotment and consequently could not be publicly sold, except in compliance . . . [with registration and prospectus requirements.]"

"The Commission approved the Division's recommendation that the request for a no-action letter be denied. (See Division's memorandum dated August 13, 1964 and Commission minute dated August 17, 1964.) . . .

"The circumstances relating to the proposed sale of the ______ stock were similar to the circumstances presented by the present request." [Goes on to cite fact comparisons.] . . .

"The Division had recommended that the requests by ______ be denied, citing the Commission's position in the ______ case. In the Commission minute dated March 25, 1965, the Commission indicated, however, that these two cases might be distinguished from the "underwriter-unsold allotment" category and suggested that consideration should be given to the formulation of a general policy, perhaps setting forth conditions relating to the granting of such requests. The staff was instructed to give further consideration to those requests and to the overall question and to report to the Commission later."

"On April 13, 1965, the Division submitted a memorandum in which it stated that it had considered the questions and concluded that it would be difficult to draft standards of general applicability to these situations. The staff also expressed the view that adoption of general standards would sacrifice a measure of administrative flexibility and recommended that for the time being each request be considered on an individual basis." (Staff memo, 1/17/68.)

APPENDIX H

FACTORS TO BE ANALYZED IN STUDYING AND COMPARING NO-ACTION MATTERS PRESENTING THE APPLICATION OF THE CONCEPT OF "CHANGED CIRCUMSTANCES"

1. Company name.
2. Party originating the request and party proposing to sell stock.
3. Lawyer: Name and location.
4. Number of shares to be sold; present price and trading volume.
5. Number of shares personally owned. Number of shares controlled with others.
6. Total number of shares outstanding and other facts relating to possible control by applicant or by person from whom he acquired the stock.
7. Date of acquisition of the stock to be sold. Date of the letter requesting a no-action letter. Date of other acquisitions of stock of the same class.
8. Holding period to date of no-action letter.
9. Manner of acquisition of the stock to be sold. Was stock subject to a formal investment restriction?
10. Proposed manner of disposition.
11. Claimed "special circumstances" and extent of detail provided.
12. Substantiation, if any, of claimed special circumstances.
13. Staff processing:
    (a) Whose signature on the responding staff letter? Which staff attorney originated it?
    (b) Does the file reflect a file search? Which files were searched? Results?
    (c) Further staff fact inquiry made? How? What facts sought?
    (d) Further written statements received from applicants? Recorded oral statements?
    (e) Written submission on legal issues?
    (f) Date of the original inquiry? Date of final staff response?
14. Factors expressly stated in the staff response as affecting the determination:
    (a) Facts
    (b) Interpretation
    (c) Conclusions
15. Additional factors appearing to affect the determination but not expressly stated in staff response.
    (a) Implication
    (b) Expressly stated in file, but not stated in response?
16. Date that reconsideration sought? How communicated?
17. Grounds urged for reconsideration?

18. Processing of reconsideration: applicable items 1–15 above.
19. Manner of reconsideration sought? (Staff? Commission?)
20. Date brought to the Commission?
21. Form of Commission consideration requested? (Hearing? Written submission?)
22. Form of Commission consideration given? Date?
23. Disposition recommended by staff? Grounds for that recommendation?
24. Commission disposition? Date?
25. Grounds stated by Commission for disposition? Indicate views towards grounds recommended by staff?
26. Any unstated grounds appear to have affected the disposition?

APPENDIX I

The following questionnaire was submitted to 43 staff attorneys in the Division of Corporation Finance. Probably because of the length and complexity of the questionnaire, only ten replies were received. Five of the replies were from attorneys who had been handling no-action matters for one year or less, and three were from attorneys with experience of six months or less. On the other hand, four responses came from attorneys with experience ranging from 18 months to 3½ years. In view of the relative instability of the force of attorneys in the Division as a whole, this is probably a satisfactory cross-section.

While some responses seemed so conflicting or inconclusive as to render them unreliable, many of the other answers seemed worth analyzing and recording. Those considered unreliable are left blank on the following form; but summaries or averages of the more reliable answers are inserted in, or follow, the appropriate blanks. Where the variations in the answers of the more experienced staff attorneys seemed possibly significant, their answers are separately averaged and recorded in parentheses following the cumulative report of all responses.

The staff attorneys were invited to comment on the fairness or effectiveness of the no-action process, and five respondents supplied comments, which are reproduced following question number 31.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
726 Jackson Place, N.W.
Washington, D.C. 20506

May 16, 1969.

QUESTIONNAIRE RELATING TO THE ADMINISTRATIVE PROCESSES OF THE DIVISION OF CORPORATION FINANCE IN HANDLING "NO-ACTION LETTERS"

(Submitted on behalf of the Administrative Conference of the United States by William J. Lockhart, consultant to the Conference)

INTRODUCTION

The Administrative Conference of the United States is a Federal administrative agency established by statute (5 U.S.C.A. §§ 571–576) "to study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies" and to make recommendations to those ends.

A Committee of the Conference has undertaken a few test studies in the area of informal procedures, among which is a study of the Division's procedures in rendering interpretive advice, focusing primarily on "no-action" letters. This study, together with information developed in interviews and examination of files, will ultimately form the basis for recommendations to the Administrative Conference, and presumably by it to the Securities and Exchange Commission. It may also form the basis for broader recommendations to other agencies relating to their advisory processes.

The following questions are designed to obtain the views of the branch attorneys on the processing of no-action letters and other interpretive advice by this Division. The questions relate to both oral and written requests for interpretive advice, with the major focus on the processes resulting in the rendition of "no-action letters." However, with stated exceptions, the inquiry *excludes* advice given in connection with the processing of registrations, proxy statements or '34 Act reports.

Except where otherwise specifically indicated, questions concerning "no-action letters" or "no-action requests" refer to the process of rendering written advice respecting the position the staff would take if stock were sold without registration under the Securities Act. This, of course, is somewhat broader than the mere question of "may I sell" because it encompasses advice on such questions as private offerings, intra-state exemptions, and the like which also are routed through the office of the Chief Counsel of the Division.

The time necessary to respond to this questionnaire should be approximately an hour. Most questions call only for percentage estimates based on your own experience; no specific count is requested. Where questions range beyond matters in which you generally have first-hand experience, your best judgment is nonetheless requested, *but please circle the response.* In some instances different questions are designed to deal with a single problem; in those cases your tolerance is solicited.

Responses will be kept fully confidential, though the full substance of the responses will be compiled and reported. Because further discussion of problems raised by your responses may be helpful, you are invited to sign your name; but if you prefer to remain anonymous, your completed questionnaire will still be most helpful. Merely return the completed questionnaire by mailing it in the enclosed, franked envelope to the undersigned.

The Chief Counsel of the Division has approved the distribution of the questionnaires, but his approval implies no endorsement of the questions. Responses, of course, are voluntary, but will be of great assistance in making an informed appraisal of the process. I would appreciate receiving your response not later than June 9, 1969.

Thank you for your thoughtful assistance.

WILLIAM J. LOCKHART
College of Law
University of Utah
Salt Lake City, Utah 84112.

Name ______________________.

1. Approximately how long have you been employed in a position involving some responsibility in the "no-action" process? ______________.

2. Approximately how many written responses to no-action requests do you prepare per month? 18.
3. How many written statements of interpretive or general advice *other than* no-action letters (and excluding registration matters) do you prepare per month? few.
4. How many requests for oral interpretive advice (excluding registration matters and inquiries relating to pending no-action letters) do you respond to per month? few.
5. Please provide your best estimate of your allocation of time to the following functions:
   (a) Analysis of registration filings, '34 Act reports, proxy materials, and letters of comment. 62%
   (b) Oral or written advice relating to (a). 7%
   (c) Preparation of no-action letters, other interpertive statements, and oral advice on matters other than those involved in (a) and (b) above. 21%
   (d) Other funtions? (Please indicate generally) 3–6%
   ____
   ____
6. What proportion of the requests for oral advice (*excluding* registration and '34 Act matters *and* pending no-action letters) do you make a record of? ______%. How and where recorded? ____________.
   ____________ No consistent practice ____________.
   ____________.
7. In what proportion of *the requests for oral advice* (*excluding registration and '34 Act matters*) does your advice include approval or recommendation of a specific course of action? ______%. (Wide variation: 6=0%; 2=50%; 2=10+25%.)
8. In what proportion of *the requests for oral advice* (excluding registration matters) do you render specific advice about staff or Commission thinking on interpretive problems relating to statutes, rules, releases, or judicial or administrative precedents? ______%. (Similar wide variation.)
9. In what proportion of *the requests for oral advice* (excluding registration matters) do you find it necessary or desirable to confirm the position you take by research, followed by a return call? ______%. By discussion with your branch chief or with other branch attorneys? ______%. With attorneys in the office of the Chief Counsel? ______%. Others (specify) ______%.
10. In what proportion of the written no-action requests is it necessary to obtain supplementary material facts from the party? 24% From Commission files? 44%. By independent investigation? 3%(5). Other?
    ____________ ____________.
    (Please indicate source)
11. In what proportion of the written no-action requests are the facts submitted by the applicant materially inconsistent with facts available to the staff in Commission files? 2%.
12. Give your best estimate of the proportion of the requests for no-action letters that are instigated as a direct result of the refusal of a broker or transfer agent to execute a transaction without such a letter? 49%. (41%)
13. What proportion of the written no-action requests *expressly state* the specific legal or interpretive questions which, in the applicant's view, are critical to determining his request? 37%. In what proportion of those cases is the *stated* question *actually determinative*? 77%.
14. In what proportion of the no-action requests do the following kinds of questions play a decisive role?
    (a) Legal-interpretive questions concerning the meaning and boundaries of statutes, rules, releases, and judicial and administrative precedents? 32% (48%).
    (b) Partially-interpretive questions of "ultimate fact" essential to

resolving the no-action request. (E.g., "control"; "investment intent"; whether stock has "come to rest"; the "sufficiency of access" to information by private offerees, etc.) 50% (43%).

(c) Discretionary questions concerning: (1) the practicality of requiring the holder to obtain registration; (2) the need for registration for protection of investors; (3) the desirability of authorizing previous SEC violators to sell; (4) the urgency of the holder's need to sell; etc. 37% (45%).

15. In what proportion of the no-action matters are the *decisive* questions expressly identified in the correspondence between the applicant and the Commission staff? 41%.

16. In what proportion of the no-action matters are the *decisive* questions expressly identified in *discussions* with the applicant? 42% (61%)

17. Where the staff attorney prepares a recommended draft refusing the request to take a no-action position, in what proportion of *those* cases is the recommendation discussed with the applicant *before* it is submitted to the Chief Counsel's office for final review? 3%. Before the Preparation in the Chief Counsel's office? ______%. After receipt by the applicant?______%. Never? approx. 95%

18. In what proportion of the cases involving refusal to take a no-action position are the applicants advised that council may *request* to be heard before the Commission? very seldom% (after Ever so advised except upon inquiry made by the applicant or inquiry) his counsel? no %

19. In what proportion of the cases involving refusal to take a no-action position are the applicants who seek a hearing advised that the staff will oppose such a hearing? ______%

20. In what proportion of cases involving refusal to take a no-action position are the applicants advised that it is possible for the staff to bring the matter to the Commission for review? very seldom %

21. In what proportion of the cases involving refusal to take a no-action position is the applicant advised that he may submit a written memorandum for Commission consideration? very seldom %

22. In what proportion of the cases involving refusal to take a no-action position do the applicants thereafter submit written memoranda for Commission consideration? very seldom % For staff consideration? ____________%

23. In what proportion of the *requests* for no-action letters are the applicants advised that some adjustment of the proposed transaction will make it more likely that the staff will support a no-action position? very seldom % In what proportion is such an adjustment made? ________%

24. In what proportion of the requests for no-action letters is the recommended response, as prepared and submitted to the Chief Counsel's office by the staff attorney, supported by an explanatory or analytical memo? 5% In what proportion of the cases are the grounds for the response discussed orally between the staff attorney and a reviewing attorney in the Chief Counsel's office? 7%

25. In what proportion of the requests for no-action letters is the recommended response prepared by the staff attorney revised by the reviewing attorneys in the Chief Counsel's office on any substantive grounds? 4% In what proportion is the recommended result reversed? 4%

26. What proportion of the no-action requests present interpretive or substantive problems whose solutions would provide useful precedent for resolving future interpretive problems? 7%

27. Do you ever prepare interpretive summaries or memos reporting or analyzing problems resolved in responding to particular no-action requests? Yes 2 responses (Comment: "2 a year.") No 8 responses. How many have you prepared in the last month? 0 Six months? ___ Year? ___

28. What distribution is usually made of such memos? ____________________

Research Source:	Proportion (%) of cases in which this is the exclusive source relied upon:	Proportion (%) of cases in which you check this source:	Proportion (%) of cases in which this sources is instrumental in resolving the no-action request:
(a) Monthly summary of interpretations.	%	1 response =20% 2 responses =5% 7 responses =0-%	%
(b) Card file of summaries of interpretations.	%	3=15-25% 3=5% 3=0-2%	%
(c) Legal memos originating in the office of the Chief Counsel or elsewhere in the Division (other than your own compilation).	%	%	%
(d) Your personally-compiled file of legal memos.	%	%	%
(e) Direct reference to previous no-action *letters* prepared within the Division (other than your own compilation).	%	1=40% 1=100% 2=5-10% 6=0%	%
(f) Direct reference to a personally-compiled file of previous no-action *letters*	%	3=60-70% 3=5--10% 4=0%	%
(g) Any previous no-action *letters* as supplemented by information in the related company files.	%	4=75-100% 4=5-% 2=0%	%
(h) Memos to the Commission and specific Commission action reflected in Commission minutes (other than monthly summaries).	%	1=5% 1=20% 8=0%	%
(i) Discussion with reviewing attorneys in the Chief Counsel's office.	%	7=5% 3=0-1%	%
(j) Discussion with other staff attorneys.	%	3=20-40% 4=5-10% 3=0-2%	%
(k) Any other research sources not generally available to the public. (Please specify.)			
	%	%	%

29. In what proportion of the no-action cases do you find that your reservoir of experience is sufficient to enable you to prepare a response without research? 69% (87%)

30. In what proportion of no-action requests do you believe that the following considerations play a significant role in determining the staff's disposition? (Please indicate percentages *as a proportion of the instances in which the stated fact is present.*) (Two respondents did not answer)

(a) The fact that the stock in question may be of the same class as that registered in a recent registration? ________% 5=5–10%, 1=20%, 3=0%

(b) The fact that the company involved is a reporting company? ________% 1=0%, 4=5–10%, 2=15–25%, 1=60%

(c) The fact that the individual applicant may have been involved in an earlier SEC violation? ________% 4=70–100%, 4=0–2%

(d) The fact that the issuing company may have been involved in an earlier SEC violation? ________% 1=95%, 3=50–60%, 1=20%, 3=0–1%

(e) The fact that the company or the individual involved may currently be under investigation with respect to possible SEC violations? ________% 4=90–100%, 2=5%, 2=0–2%

(f) The fact that the individual seeking to sell without registration has a contractual claim entitling him to demand registration? ________% 1=80%, 2=20%, 2=2–5%, 3=0%

(g) The extent to which the stock involved is currently being actively traded? ________% 3=20–40%, 3=5–10%, 2=0–1%

(h) The fact that the stock involved is a relatively small proportion of the total stock of the same class currently outstanding? ________% 1=75%, 2=40–50%, 2=20%, 3=10%

(i) The fact that the dollar value of the stock to be sold is small? ________% 3=50=75%, 2=10–20%, 2=5%, 1–0%

(j) The urgency of the applicant's need to sell the stock in question? ________% 1=70%, 2=40–50%, 3=20–25%, 2=10–15%

(k) Other factors? (Please specify) ________
Length of holding period ________ 80–95%
________ ________%

31. Your further comments about the fairness or effectiveness of the no-action or advisory processes are invited:

Respondent #4 (Experience—less than 1 year):

One of the most striking aspects of the no-action process in regard to fairness is what might be called the political facts of life. A little assistance from a Congressman or Senator will enable a good lawyer to permit almost any shareholder to sell his stock. The only exception which I have observed was a case of a man who wished to sell without any basis in law or fact, and at the time the company was under investigation by the Commission.

In regard to investigations, there seems to be a real distinction drawn between a formal SEC investigation and an informal one, even if the staff is fully aware that illegal actions have been taking place. The motivation basically has been that if the Commission should make some kind of public announcement in the near future about the company in question, the Division would look bad if it had permitted a sale to take place.

An interesting area of our procedure is "taking a letter to the Commission". This is done when the person who has requested a no-action letter is dissatisfied with the answer which he has received from the staff. What is involved at the staff level is the writing of a memorandum by an attorney. This is checked by the Chief Counsel's Office and sent to the Commission. Such memoranda are an added burden on a staff which is already considered overburdened. In addition, the members of the Chief Counsel's Office do not like to have the Commission second-guessing their decisions unless they are positive about being affirmed. The result is that the mere threat of "taking a letter to the Commission" will enable the attorney involved to get his no-action letter which he would not have gotten otherwise. In regard to fairness, it is only persons employing sophisticated counsel who are able to avail themselves of this benefit.

I am afraid that the accuracy of your study may be diluted by the large number of routine letters which we process. Probably half of all the letters we receive are from stockholders who have held shares of stock for one to three years and now want to sell. The same legal issues are involved in most of these letters. To see how dilution of the results could come about, notice my answers to 27 (b) and (g). Both of these questions have similar answers. One reason they are similar may be that out of the total, including routine letters, they are both small. Theoretically, the answers should be equally accurate whether taken as a percent of total letters or as a percent of total letters minus the routine. In practice, this is not so. One cannot really remember whether a procedure takes place 5 or 10 per cent of the time. What is given is a rough estimate. In retrospect, my answer that I find both methods instrumental 5 per cent of the time is misleading. I find (g) instrumental far more often than (b), but since it was such a small part of the total letters, I put it in the same general range as (b), which it is. Maybe this is all you want but to me it shouldn't be. The routine letters may be largely eliminated through the Wheat study and other efficiency measures. If you have not discriminated sufficiently among the other letters, which are the ones which require some analysis, your results may have little value.

Respondent # 6 (Experience—more than 18 months):

This questionnaire evidences a lack of understanding of the no-action procedure.

Approximately 80% of the no-action requests involve small shareholders, who have no other relationship with the company and the only question is one of "investment intent." A G.S. 2 could decide those that concern whether there was an adequate 2–3 year holding period. For those involving a change of circumstances a Solon would fail.

The failure is not with the fairness of the no-action procedure, but with the Commission in not more forcefully enforcing the Securities Act, with criminal proceedings if necessary. Almost 60 to 70% of the above mentioned letters from small shareholders concern a small number of companies with a history of violations of Section 5 of the Securities Act. Some of these have even been enjoined from further violations. These companies continue, however, issuing stock to employees and creditors. Until these companies are stopped we will continue the travesty of examining the investment intent of what are for most part unsophisticated and often poor investors. The more sophisticated and wealthy investors rarely resort to this procedure since they have protected themselves with contractual rights of registration.

Respondents # 7 (Experience—more than 18 months):

I find the SEC's policy extremely unfair in that in over 90% of the requests, the determining factor is whether or not the stock was held for 2 years, 2½ years, or 3 years (depending upon the chief counsel or his assistant's mood). A request for a no-action letter in many cases is of great importance to the applicant and the lack of standards in this area and subjective judgment without much consideration is at times shocking. There is a great need for specific public guidelines and dissemination of this information.

Respondent #8 (Experience—more than 18 months):

The no-action decisions are basically fair with some arbitrariness concerning length of holding periods and unforeseeable change of circumstances. It appears that guidelines or even rules of thumb could be instituted since those questions are the great majority of the requests.

Almost no advice is oral but the no-action work could be handled faster and more efficiently over the phone, especially no-action rejections and requests for supplemental information. Often parties who are turned down do not understand the reason and write again. A telephone reply would avoid this problem.

An application form or forms could be devised to permit speedy processing and would also eliminate the need for supplemental information requests.

Letters mailed out in response to requests should state the reasons for denial, other remedies available or include a copy of a pertinent commission release. This would eliminate additional repeat correspondence and support public confidence. Most no-action responses are boiler plate today and the processing could be less time consuming through programing of responses.

Chief Counsel's library filing system needs an overhaul. Often legal memoranda is more on the point and reference cards on the same are too sketchy. Many cards are obsolete or duplicates and should be removed. Indexes are worn or missing; there appears to be no master index or cross-references.

The process of distributing recent cases, summary of interpretations and releases to the staff attorneys would be more beneficial if also indexed and cross-referenced into a filing system.

There is no list of bibliographical or other sources for staff attorneys to aid in research.

Correspondence is given priority based on person to whom it is addressed rather than urgency of the request and other more important criteria.

Respondent #9 (Experience—6 months or less):

This questionnaire is not related to our staff operations in any way. The responses to be elicited have no bearing on the actual no-action requests submitted. A better questionnaire could have been prepared if someone had bothered to analyze actual operations first.

Respondent #10 (Experience—extensive):

Since the basic question in connection with proposed public sales is whether registration is required or an exemption is available, the process appears to be fair.

(APPENDIX J OMITTED)

APPENDIX K

CODE OF FEDERAL REGULATIONS

TITLE 17, CHAPTER II

PART 202—INFORMAL AND OTHER PROCEDURES

Sec.
202.1 General.
202.2 Pre-filing assistance and interpretative advice.
202.3 Processing of filings.
202.4 Facilitating administrative hearings.
202.5 Enforcement activities.
202.6 Adoption, revision and recission of rules and regulations of general application.
202.7 Submittals.

AUTHORITY: The provisions of this Part 202 issued under secs. 19, 23, 48 Stat. 85, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, secs. 38, 211, 54 Stat. 841, 855; 15 U.S.C. 77s, 78w, 79t, 77sss, 80a-37, 80b-11.

SOURCE: The porvisions of this Part 202 appear at 25 F.R. 6736, July 15, 1960, unless otherwise noted.

§ 202.1 General.

(a) The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as registration statements, periodic and ownership reports, and proxy solicitation material, and for the filing of certain plans of reorganization, applications and declarations seeking Commission approvals; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes and for enforcement of statutory provisions; and (4) for the adoption of rules and regulations where necessary to effectuate the purposes of the statutes.

(b) In addition to the Commission's rules of practice set forth in Part 201 of this chapter, the Commission has promulgated rules and regulations pursuant to the several statutes it administers (Parts 230, 240, 250, 260, 270 and 275 of this chapter). These parts contain substantive provisions and include as well numerous provisions detailing the procedure for meeting specific standards embodied in the statutes. The Commission's rules and regulations under each of the statutes are available in pamphlet form upon request to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402.

(c) The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings. These are supplemented where feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. There follows a brief description of procedures generally followed by the Commission which have not been formalized in rules.

(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved. And any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division. In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its own motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

§ 202.2 Pre-filing assistance and interpretative advice.

The staff of the Commission renders interpretative and advisory assistance to members of the general public, prospective registrants, applicants and declarants. For example, persons having a question regarding the availability of an exemption may secure informal administrative interpretations of the applicable statute or rule as they relate to the particular facts and circumstances presented. Similarly, persons contemplating fillings with the Commission may receive advice of a general nature as to the preparation thereof, including information as to the forms to be used and the scope of the items contained in the forms. Inquiries may be directed to an appropriate officer of the Commission's staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the Commission's central office or, except in connection with matters under the Public Utility Holding Company Act of 1935 and certain matters under the Investment Company Act of 1940, at one of its regional offices.

APPENDIX L–1

January 22, 1968.
10:20 a.m.

Memorandum to:

Mr. Worthy	Mr. Michaely
Mr. Bagley	Mr. Dollet
Mr. Shreve	Mr. Haggerty
Mr. Hocker	

Re: *X Company*—Request of *Y Company* for a "no action" letter in connection with proposed sale of stock

(Messrs. Michaely and Huge were present.)

Upon the recommendation of the Division of Corporation Finance contained in its memorandum dated January 17, 1968, the Commission denied a request of counsel for *Y Company* for a "no action" letter in connection with *Y Company's* proposed sale of 16,250 shares of the common stock of *X Company*, without registration under the Securities Act of 1933.

Orval L. DuBois,
Secretary

Memorandum

January 17, 1968.

To: The Commission
From: The Division of Corporation Finance
Re: Request for no action letter regarding the public sale of 16,250 shares of *X Company* (File No. ____) common stock by Y Company.
Recommendation: That the request be denied.

On December 5, 1966 the staff received a request for a no action letter regarding the public sale of shares of *X Company* by *Y Company*. The staff denied the request on December 20, 1966; however, counsel for *Y Company* has now requested that the matter be submitted to the Commission.

X Company had 1,666,268 shares of common stock outstanding as of August 31, 1967. The common stock is listed on the American Stock Exchange where the trading volume for each of the four weeks for the period ended January 5, 1968 was 34,300, 17,400, 45,700 and 59,100 shares respectively. The stock closed at a price of 9⅝ on January 16, 1968 and thus the total market value of the subject shares is approximately $156,406.

Facts Regarding the Request

On March 20, 1962 *X Company* issued warrants to *Y Company*, the principal underwriter of its registered public offering (File No. ____), covering an aggregate of 35,000 shares of common stock.[12] The warrants and underlying shares were included in the registration statement and *X Company* undertook to file a post-effective amendment to cover any public offering of such securities.

All of the 35,000 warrants were exercised by *Y Company* and its assignees (partners and their associates) into 48,064 shares of common stock (adjusted for stock dividend distributions) in October 1963. *Y Company's* assignees subsequently sold their 31,814 shares on the American Stock Exchange prior to December 31, 1965 pursuant to a post-effective amendment filed May 28, 1965. *Mr. A*, a partner in *Y Company*, is a director of *X Company*. The staff has been advised that *X Company* does not plan to have a registered offering of its securities in the near future.

Discussion

The same questions that are presented by this request were last considered by the Commission on August 17, 1964 in connection with the request by *Z Company* for a no action letter covering a proposed sale of 10,353 shares of *M Company* common stock, and on March 25, 1965 and April 15, 1965, in connection with requests by *N Company* and *O Company* for no action letters covering proposed sales of 10,000 shares of *P Company* common stock by *N Company* and 14,062 shares of *Q Company* by *O Company*.

In the *Z Company* matter the Division took the position that the shares were an unsold allotment and consequently could not be publicly sold, except in compliance with the registration and prospectus requirements of the 1933 Act or under a Regulation A filing. In that case, *Z Company*, which was the principal underwriter for an offering of 500,000 shares of *M Company's* common stock, purchased the shares at the public offering price and placed them in the accounts of partners. The partners wished to sell the stock in order to provide funds necessary for the reorganization of that company as a corporation and to diversify their investment. In the purchase contract *M Company* agreed, if requested, to prepare and file a post-effective amendment for the public sale of the shares acquired by the *Z Company* partners. *M Company's* shares were listed on the American Stock Exchange.

The Commission approved the Division's recommendation that the request for a no action letter be denied. (See Division's memorandum dated August 13, 1964 and Commission minute dated August 17, 1964.)

On March 25, 1965, the Commission first considered requests relating to the *Q Company* and *P Company* stock. *N Company* was one of the underwriters in a public offering of 400,000 shares of *P Company* stock and purchased the *P Company* shares for its own investment account at the public offering price. The registration statement contained an undertaking by *P Company* to file a post-effective amendment with respect to such shares prior to any public offering of them. *P Company* stock was listed on the New York Stock Exchange.

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[12] The underwriter paid $.01 per warrant.

The circumstances relating to the proposed sale of the *Q Company* stock were similar to the circumstances presented by the present request. A predecessor of *O Company* had been an underwriter with respect to 30,000 shares out of 67,000 shares covered by a registered offering in January 1961. *O Company* obtained warrants at $.05 per warrant and by exercising the warrants purchased 3,750 shares at a bargain price.[13] In February 1964 a request for a no action letter was made by counsel for *O Company* and was denied by the Division. In March 1965 the request was renewed and the matter presented to the Commission. *Q Company* shares were listed on the American Stock Exchange.

In the cases relating to *M Company* and *Q Company*, the market value of the stock involved was less than $300,000 and the number of shares represented approximately 1% of the outstanding and was less than the trading volume in at least one of the four weeks preceding the receipt of the requests. The same is true of the request relating to *X Company*. In the case of *P Company*, the stock had a market value of approximately $500,000 and represented about ¼ of 1% of the outstanding. In each case the issuer had agreed to file a post-effective amendment to cover any public offering of the stock in question and in each case the broker requesting the no action letter argued that the time, inconvenience and expense involved in preparing the post-effective amendment was not warranted by the value and amount of the stock.

The Division had recommended that the requests by *N Company* and *O Company* be denied, citing the Commission's position in the *M Company* case. In the Commission minute dated March 25, 1965, the Commission indicated, however, that those two cases might be distinguished from the "underwriter-unsold allotment" category and suggested that consideration should be given to the formulation of a general policy, perhaps setting forth conditions relating to the granting of such requests. The staff was instructed to give further consideration to those requests and to the overall question and to report to the Commission later.

On April 13, 1965, the Division submitted a memorandum in which it stated that it had considered the questions and concluded that it would be difficult to draft standards of general applicability to those situations. The staff also expressed the view that adoption of general standards would sacrifice a measure of administrative flexibility and recommended that for the time being each request be considered on an individual basis. The staff further recommended that the request by *N Company* relating to the sale of the *P Company* stock be granted, taking the position that although the status of those securities as part of an unsold allotment was not free from doubt, taking a no action position would not appear to subvert purposes of the Securities Act. The staff noted that the stock had been held for more than five years, that *P Company* had a history of substantial operations, that the company was a reporting company and the stock was actively traded on a national securities exchange. The staff also noted that there were no unusual circumstances which would indicate that an unregistered sale at that time would be inconsistent with the public interest or with the protection of investors.

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[13] Because of stock splits and a stock dividend, the number of shares covered by the no action request became 14,062.

With respect to the request by *O Company* the staff was not prepared to recommend that the *Q Company* shares could be sold without registration. This position was based, however, on the fact that the Division of Trading and Markets was at that time conducting an informal market quiz to determine the causes for a price rise in the company's stock from $13 in January 1965 to about $25 in April 1965. The staff stated were it not for that fact it would recommend that a no action letter be issued after a holding period of four years.[14]

The Division still believes that these questions should be decided on a case by case basis, and it is our view that stock obtained by underwriters in connection with a public offering should be regarded as unsold allotment unless there appears to be some good reason to the contrary. Perhaps where shares are purchased by an underwriter at the public offering price without any underwriter's discount a good reason exists, but that need not be decided now.

There is an alternative reason for taking the position that in cases such as the one presented the underwriter should not be permitted to make a public sale of the securities without registering them. Where an underwriter acquires shares upon exercise of warrants obtained at the time of the offering, the circumstances indicate quite clearly that the warrants are being issued as additional underwriting compensation. It is reasonable to impute to the underwriter an intention to exercise the warrants and sell the underlying stock when the market price of the stock has risen sufficiently to allow him to make an acceptable profit; hence the underwriter cannot be considered to have taken the stock for any investment purpose. In Securities Act Release No. 4552 the Commission stated:

> "There is no legal justification for the assumption that holding a security in an 'investment account' rather than a 'trading account,' holding for a deferred sale, for a market rise, for sale if the market does not rise, or for a statutory escrow period, without more, establishes a valid basis for an exemption from registration under the Securities Act." [15]

The same argument can be made whenever an underwirter obtains, in connection with a public offering, any options to purchase the issuer's share or any so-called "cheap stock."

In the present case the issuer is obligated to file any necessary post-effective amendment, as was true in each of the other cases mentioned. We note that the policy of requiring registration of shares and warrants sold to underwriters with an undertaking by the issuer to file the necessary post-effective amendments is unequivocally stated in paragraph 29 of Securities Act Release 4666 and paragraph 10 of Securities Act Release 4890. It would be inconsistent with this clearly defined policy to adopt the attitude that because of the relatively small amounts involved, requests such as the present one should be granted, since it can be anticipated that underwriters will normally not acquire warrants for such large numbers of shares that the cost of filing a post-effective amendment would be insignificant in comparison to the market value of the stock.

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[14] See Division memoranda of March 23 and April 13, 1965 and Commission minutes dated March 25 and April 15, 1965.

[15] Footnote referring to the almost identical statement in Securities Act Release No. 3825 is omitted.

The arguments that the number of shares involved is not substantial and that the prospectus delivery requirements are not effective because the company is listed are the same as those that were made when the Commission considered requests for no action letters under Rule 133 for transactions in which one and two man corporations were acquired by listed companies. Although these arguments may have some emotional appeal, and although the Commission authorized no action letters under Rule 133 on the basis of these arguments, the Commission will recall that it was ultimately impelled to reverse that position because of the interpretive mire that resulted. On the basis of that experience, and in order to avoid similar confusion, those arguments should be rejected here.

Recommendation.

For the foregoing reasons, it is recommended that the request for a no action letter be denied.

APPENDIX L–2

March 17, 1969.
10:00 a.m.

Memorandum to:

Mr. Shreve	Mr. Sporkin
Mr. Hocker	Mr. Williams
Mr. Whitney	Mr. Hyman
Mr. Haggerty	Denver R. O.
Mr. Pollack	

Re: *X Company*—Request of Attorney, *Mr. A* for a "no action" letter

Upon the recommendation of the Division of Corporation Finance contained in a memorandum dated March 14, 1969, the Commission denied the request of Attorney, *Mr. A* for a "no action" letter with respect to his proposed sale of 25,000 shares of common stock of *X Company* and also denied his request for an opportunity to be heard by the Commission in the matter.

Nellye A. Thorsen,
Assistant Secretary.

MEMORANDUM

March 14, 1969.

To: The Commission

From: The Division of Corporation Finance

Re: (1) Request for a no action letter for the sale of 25,000 shares of the common stock of *X Company*
  (2) Request by applicant for an opportunity to be heard by the Commission.

Recommendation: (1) That the no action request be denied
  (2) That applicant's request for an opportunity to be heard be denied.

This Division has received a request for a no action letter from Attorney, *Mr. A* with regard to his proposed sale of 25,000 shares of *X Company* common stock. Based upon quoted over the counter bid prices on March 7, 1969 for *X Company* stock of 12 and 14 by two dealers, the amount of the proposed transaction is approximately $300,000 to $350,000.

By letter dated February 7, 1969, *Mr. A* advised the Division of the following facts relating to the proposed sale:

In September 1966, *Mr. A* represented a group of investors who acquired control of *X Company*, a Colorado corporation. At that time *X Company* was a public company but completely inactive and not engaged in any operations whatever.

Mr. A's clients owned what appeared to *Mr. A*, based on competent geology reports, to be valuable *mineral* properties which were transferred to *X Company*. At the time control was acquired in September 1966, *Mr. A* purchased under investment letter from *Y Company*, a member of the control group, 25,000 *X Company* common shares, and subsequently *Mr. A* became a director and secretary of the company. Less than a year later when it became apparent to *Mr. A* that the company did not have the financial ability to proceed with the development of the *mineral* property, *Mr. A* resigned as an officer and director of the company and has had no further contact with the company since that time. *Mr. A* understands that since that time control of the company has been sold to new interests. In view of the above facts, *Mr. A* concludes that he may effect a sale of the 25,000 shares of *X Company* common stock pursuant to the exemption provided in Section 4(1) of the Securities Act of 1933 as a "transaction by any person other than an issuer, underwriter, or dealer." The Division agrees that *Mr. A's* conclusion of law is correct.

On May 16, 1967, the Division of Trading and Markets by Memorandum requested the Commission to enter a formal order of investigation naming *X Company* to determine if there had been violations of the registration and anti-fraud provisions of the Federal securities laws, for the reasons set forth in the attached copy of such Memorandum in File No.__________. Thereupon the Commission entered a formal order authorizing the investigation which as of this date continues. On February 27, 1969, David Hyman, Chief Enforcement Attorney, Division of Trading and Markets, asserted in a memorandum to this Division that in view of the pending investigation involving *X Company* and because of the belief that such company has no assets of any substance and that the market price of *X Company* may therefore represent the effect of manipulation, it is the recommendation of the Division of Trading and Markets that no action requests with respect to *X Company* common stock be denied.

Mr. A was advised by letter dated February 28, 1969, that the Division was unable to conclude that his shares could be publicly sold without compliance with the registration requirements of the Securities Act, and he replied by letter dated March 3, 1969, requesting reconsideration of this Division's determination and an opportuntiy to appear before the Commission for oral argument.

Based upon the facts hereinabove set forth, the Division recommends that the requests of *Mr. A* for a no action letter relating to his proposed sale of

25,000 shares of *X Company* common stock and for the opportunity to be heard by the Commission be denied.

Attachment
PGross

MEMORANDUM

May 16, 1967.

To: The Commission
From: Division of Trading and Markets
Subject: *X Company* (File No.____)
Recommendation: That the Commission enter a formal order of investigation naming the subject company to determine if there have been violations of the registration and anti-fraud provisions of the Federal securities laws (Section 5 and 7 of the '33 Act and Section 10(b) of the '34 Act and Rule 10b–5 thereunder).

The Denver Regional Office has reported the following information:

X Company was incorporated in 1954 as *XY Company* and between 1954 and 1957 filed 4 Regulation A offerings in which it raised approximately $240,000 from the sale of common stock. The company's name was changed to *X Company* in 1960 at which time control of the corporation appears to have passed into the hands of *Mr. B* and *Mr. C*. Both *Mr. B* and *Mr. C* have been the subject of numerous Commission investigations and should be considered major securities violators.

Virtually no market existed for the stock of *X Company* in 1965 and 1966 and it is believed that the company is virtually a shell corporation. In September 1966 attempts were made to reactivate the company. New management consisting of *Mr. D* and *Mr. A* purportedly took over *X Company* and brought in *Mr. E* (*Mr. E* was recently convicted of securities violations in the SDNY in connection with the *M Company* case). *Mr. E* purportedly arranged to sell certain *mineral* mining claims near *City of* __________, California to *X Company* in exchange for 150,000 shares of *X Company* common stock. In December 1966 *Mr. D* advised the Denver brokerage firm of *Z Company* by letter that *X Company's mineral* properties had a value in excess of $400,000,000 and also a *mineral* mining claim valued in excess of $500,000. Subsequently, *Z Company* mailed a post card to 2,000 stockholders of *X Company* advising them that there was a market for *X Company* stock of $5 bid and $6 asked. Recently *Z Company* and occasionally other brokers have appeared in the pink sheets with this quotation. An examination of *Z Company's* trading records reveals no retail transactions in this stock. However, examination of *X Company's* transfer records reveal that in March 1967 *Mr. D* and *Mr. E* caused several large denomination certificates to be broken down into smaller certificates. One of these certificates for 5,000 shares was issued to *Mr. F* of ________, Florida and this stock has in turn been pledged with the *Q Bank* in *City of* __________. Additional reports have been received stating that *Mr. D* and *Mr. E* and others have attempted to sell the *X Company* stock.

It appears that there is no genuine market for *X Company* securities and that the quoted prices may be fictitious. Further, the valuation of the mining claims is in all likelihood false and misleading.

In view of the past background of the individuals connected with the *X Company,* it is believed that these persons will not give testimony or other information without a subpoena and that subpoena power will be necessary to obtain bank records and other evidence. It is therefore recommended that the Commission issue a formal order of investigation in this matter to determine if there have been violations of the registration and anti-fraud provisions.

MDHyman:rls

APPENDIX L–3

Section 4(1); Change of Circumstances

June 7, 1968—Commission Minute—Mr. A proposed to sell 15,186 shares of X Company common stock without registration under the Securities Act of 1933.

Mr. A acquired 7,143 X shares in Dec. 1965, 7,143 shares of X in March 1966 and 900 X shares in Oct. 1966, all for investment. In connection with his initial purchase in Dec. 1965, A received an option to acquire 1,250 shares at an exercise price of $2.80 on or before Dec. 1970, and another 1,250 shares on or before March 1971.

A contends that he has undergone an unforeseeable change of financial circumstances. In July 1966 he left a position which had provided a gross earning of $300,000 per year and became principal stockholder, an officer and a director in another company from which he has been receiving a salary of only $60,000 per year. Furthermore, in Feb. 1967, A borrowed $300,000, and used $60,000 to pay various mortgages on real estate, $50,000 to repay a debt owed to one of his clients, and the balance to buy call options. The bank is now pressing for repayment of the debt. In addition, A owes $59,000 in Federal income taxes for 1964 and 1965 and $107,000 is due on his 1967 taxes.

The staff considered that the income tax liabilities were not unforseeable change of circumstances. Moreover, the 1964 and 1965 asserted deficiencies represent only a potential liability. With respect to Mr. A's obligation to repay the $300,000 loan, the incurrence of this new debt to pay old debts existing at the time he acquired the X stock and to speculate in the stock market does not constitute an unforeseeable change of circumstances.

Registration required.

CARD ONLY

June 7, 1968.
10:00 a.m.

Memorandum to:

MR. BAGLEY	MR. MILLER
MR. SHREVE	MR. KOEPPEL
MR. MICHAELY	MR. HAGGERTY

Re: *X Company*—Proposed sale of stock by *Mr. A*

Consideration was given to a memorandum dated June 3, 1968, from the Division of Corporation Finance in the matter of a request by counsel for *Mr. A* for a "no action" letter with respect to *Mr. A's* proposed sale of 15,156 shares of common stock of *X Company* without registration under the Securities Act of 1933.

Upon the recommendation of the Division, for the reasons stated in the memorandum, the Commission denied the request for a "no action" letter and also denied counsel's request to be heard in the matter.

ORVAL L. DUBOIS,
Secretary.

MEMORANDUM

June 3, 1968.

To: The Commission
From: The Division of Corporation Finance
Re: (1) Request for a no action letter for a sale of *X Company* common stock
(2) Request by counsel for an opportunity to be heard by the Commission
Recommendation: (1) The no action request be denied
(2) Counsel's request for an opportunity to be heard be denied.

Background:

In a series of letters which began on March 1, 1968, counsel for *Mr. A* requested a no action letter for a proposed sale by *Mr. A* of 15,186 shares of common stock of *X Company.*

Mr. A acquired 7,143 shares in December of 1965, 7,143 shares in March of 1966 and 900 shares in October of 1966, all for investment. The shares have a present market value of approximately $400,000. In connection with his initial purchase in December 1965 he received an option to acquire an aggregate of 2,500 shares at an exercise price of $2.80, exercisable half on or before December 29, 1970, and the remaining half on or before March 10, 1971.[16]

The request for a no action letter is premised upon a change of *Mr. A*'s financial circumstances. The relevant facts concerning this matter are as follows:

Until July of 1966 *Mr. A* was a registered representative and an officer of *Y Company* and had gross earnings of approximately $300,000 per year. He then became principal storkholder, an officer and a director of *Z, Inc.*, a member firm on the New York Stock Exchange. He now receives a salary of $60,000 a year.[17] In February 1967 *Mr. A* borrowed $300,000, using shares of *a widely held company* owned by one of his associates as collateral for the loan. Sixty thousand dollars was used to pay various mortgages on real estate owned by *Mr. A*, $80,000 was used to buy art, furniture, and antiques, $50,00 was used to repay a debt owed by *Mr. A* to one of his clients, and the balance of approximately $130,000 was used to buy call options.

Counsel's position:

Counsel claims that *Mr. A* has experienced a change of circumstances that would justify a present sale of the *X Company* shares. The bank is now pressing for repayment of the debt which stands in the amount of $272,500, and *Mr. A's* associate is demanding return of the stock that was used as collateral for the loan. In addition, counsel asserts that *Mr. A* owes $59,000 in federal income taxes for 1964 and 1965 and that $107,000 is due on his 1967 taxes.

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[16] At present the option has not been exercised.

[17] In addition, the firm earned more than $200,000 after taxes in 1966, of which *Mr. A's* interest (26 percent) would be $57,000. We have not been informed of the firm's earnings in 1967, but in the first quarter of 1968 it lost approximately $100,000.

Since January 1968 *Mr. A* has purchased call options covering a total of approximately 11,000 shares of various securities. Some of the options were purchased after we received the first request for a no-action letter.

Counsel also advises: (1) that *Mr. A* has granted other shareholders in his brokerage firm an option to purchase his shares at book value (approximately $187,000), but the option was not exercised; and (2) that *X Company* has offered to include in a pending registration statement up to five percent of the shares held by certain shareholders, including *Mr. A*, who would be entitled to include 750 shares.

Division's position:

We do not believe the facts demonstrate that *Mr. A* has had a change of circumstances that would justify a present sale of his shares. His financial difficulties derive from two sources: (1) income tax liabilities; and (2) the need to repay the $300,000 loan.

Concerning the income tax liabilities, we cannot understand how these can be considered unforeseeable changes in circumstances. Furthermore, the amounts owed for 1964 and 1965 are still in the category of an asserted deficiency and presumably subject to settlement. In any event, the $59,000 sum represents only a potential liability. Insofar as the 1967 taxes are concerned, counsel has not pointed to any unusual situation to indicate that *Mr. A's* taxes were any greater than could reasonably be anticipated on the basis of his income for that year, or that he should have been surprised when he was expected to pay the tax when due.

In the Division's opinion *Mr. A's* reliance on his obligation to repay his loan as a basis for obtaining a no-action letter is also misplaced. As noted above, the $300,000 was used to pay some existing debts, to buy art objects and to speculate in the stock market. The fact that he had existing debts to pay at the time he acquired the *X Company* shares certainly would not support a claimed change of circumstances; neither would the fact that he incurred a new debt to enable him to pay the old ones. Concerning his market speculations, we have never understood that adverse experience in this kind of activity by someone in the brokerage business would constitute an unforeseen change of circumstances.[18]

Recommendation:

For the above reasons, the Division recommends that the no-action request be denied.

At counsel's request we are attaching copies of letters he has asked to have presented to the Commission. We do not believe he has anything material to add to the information contained in this memorandum and stated in somewhat more detail in his letters, and accordingly recommend that his request to be heard also be denied.

Attachments
GPMichaely, Jr.

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[18] It is not clear that *Mr. A's* speculative activities have been adverse, but we do not believe it is necessary to elaborate on that question.

APPENDIX L–4

July 9, 1964.
11:00 a.m.

Memorandum to:

MR. WORTHY	MR. HOCKER
MR. BAGLEY	MR. DOLLETT
MR. SHREVE	MR. HENEGHAN
MR. LESE	

Re: *X Company* (File________). Request of *Mr. A* for a "no action" letter

(Messrs. Shreve, Lese, Heneghan and Ficca were present.)

Consideration was given to a memorandum dated July 6, 1964, from the Division of Corporation Finance with respect to *X Company*, (File ________), in particular a request of counsel for *Mr. A*, for a "no action" letter with respect to *Mr. A's* proposal to sell his holdings of 55,555 shares of *X Company* common stock without prior registration under the Securities Act of 1933. For reasons outlined in its memorandum, the Division recommended that the request for a no action letter be denied. During the discussion, however, the representatives of the Division conceded that a "close question" was presented under the facts here involved, in particular the nature of the "changed circumstances" presented in behalf of *Mr. A*.

After due consideration, the Commission concluded that the changed circumstances in this case were such that the Division could appropriately take a no action position with respect to *Mr. A's* proposed sale of stock without registration thereof.

ORVAL L. DUBOIS,
Secretary.

July 6, 1964.

MEMORANDUM

To: The Commission
From: Division of Corporation Finance
Re: X Company (File No.________)
Subject: Request for a "no action" letter for the proposed sale of 55,555 shares of common stock of *X Company* by *Mr. A*
Recommendation: The request be denied.

Facts

Mr. A has requested a "no action" letter for the sale of 55,555 shares of common stock of *X Company* (approximately 1.5% of the 3,328,972 shares of common stock outstanding). This would represent approximately $798,000 based on the high bid price of 12¾ on July 2, 1964. *X Company*, which made an offering of 2,200,000 shares at $11 a share under a registration statement effective October 30, 1963, is engaged in *business* in the Los Angeles and San Francisco areas.

On August 13, 1963, *Mr. A* purchased the 55,555 shares at $9 per share pursuant to a letter of investment. *Mr. A* was one of the 14 original investors who purchased, subject to an investment representation, an aggregate of 1,328,972 shares of *X Company* on various dates in August, 1963. *X Company* agreed that if it filed a registration statement after December 31, 1964, these shares would be included in the registration statement.

Mr. A is the president and sole stockholder of *Y Company* of *City of* ———————, *State Q,* which was incorporated in late 1962 for the purpose of designing and building *an expensive device of general application,* is the chief designer of the *device* in which the Department of Defense is said to have an active interest. *Mr. A* has invested over $9,000,000 in the *device's* development. The development program called for completion of the *device* in time for certification by *a federal agency* in early (*date*) with the *device* to be available for delivery in the middle of that month. *Bank Z* extended to the company a line of credit to carry the *device's* development through to certification with a total credit of $5,450,000 having been extended. As a result of engineering difficulties the program fell behind and certification was then scheduled for *several months later.*

Certification was again delayed because of an accident (attributed by *X Company* to the negligence of *the government*) which destroyed a test *device* valued at approximately $2,000,000. The *device* was insured up to $500,000.

Mr. A's line of credit with *Bank Z* for up to $12,000,000 was collateralized by a $10,000,000 note and a consultant contract which he received from *W Company* with which he was formerly associated. *Bank Z* decided to terminate its line of credit to *Mr. A* because of the proposed cut in defense spending which the Bank feared would have an adverse effect on *W Company's* business and because of a strike suit filed against *W Company.*

Mr. A has requested *X Company* to register his shares but *X Company* has refused on the grounds: it has no legal obligation to do so; the company is in the process of setting up operations and could not take time at this critical period to file a registration statement; and the company does not want to set a precedent for others who took in the same private offering to demand that their shares be registered.

Mr. B, former Undersecretary of the Treasury and counsel for *Mr. A,* and *Mr. A* have asserted that *Mr. A* could not have foreseen in (*date*) the termination of his line of credit which as available at that time would have been more than adequate to carry his development plans to certification by the *federal agency.* This, coupled with the engineering difficulties and subsequent accident, are factors which *Mr. A* asserts could not have been reasonably foreseen at the time he purchased the *X Company* stock for investment. In further support of his "no action" request, *Mr. A* has indicated that because of the delays and lack of funds, he has been forced to discharge 250 of the 700 employees at his plant and others have had their salaries deferred. If he is unable to sell the *X Company* shares, he indicates he will be forced to close his plant thereby resulting in economic hardship to all persons working at the plant. In this connection, Mr. Richard Cohen of the Department of Commerce spoke with a member of the staff by phone on behalf of Undersecretary Roosevelt. He indicated that the Commerce Department was instrumental in the *Y Company* plant being located in the *city of* ————————, *State Q,* where there is an unemployment problem. Mr. Cohen indicated that Mr. Roosevelt would forward to the Division information regarding background as to *Y Company* and the Basis for the interest of the Department of Commerce in *Y Company.* As yet we have not received this letter.

We received a letter dated July 1, 1964 from Congressman *C* of *State Q* requesting favorable action on the "no action" request.

Mr. A has advised that he has attempted to sell an interest in his company, borrow at usurious rates, sell his *X Company* stock privately, borrow from various financial institutions including small business investment companies but has only been successful in borrowing from his family trust funds which are presently exhausted. He has indicated that if he is free to sell his *X Company* stock, certification should be forthcoming in 30 days, after which he will have no additional financing problems.

Division's Position

On May 19, 1964, the Division informed *Mr. A* that in view of the short period of time the stock had been held and the nature of the change in circumstances, we were unable to conclude that the *X Company* held by him might be sold to the public without compliance with the registration requirements of the Securities Act of 1933. Although *Mr. A* has submitted certain additional information since that time, we find no basis for reversing our conclusion. It is the Division's position that when a company is in the experimental stages of building a new *device*, it should be able to foresee that engineering and other difficulties are likely to arise. When *Mr. A* purchased the *X Company* stock in August, 1963, *Y Company* had only been in existence for about eight months. At that time all the mechanical and engineering problems had not been faced so that it is questionable that such problems could not have been reasonably foreseen. In addition to the foregoing, if a "no action" letter were granted to *Mr. A*, it might be difficult to find a basis for denying similar requests from persons who required *X Company* at the same time as *Mr. A*.

On the basis of the foregoing, it is the recommendation of the Division of Corporation Finance that the requested "no action" letter be denied.

APPENDIX L-5

Section 4(1); Change of Circumstances; Investment

July 3, 1968—Commission Minute

Two stockholders of the company proposed to sell without registration under the Securities Act of 1933 10,000 shares of its stock taken for investment in February 1967 on account of certain legal services. The two stockholders alleged that they were entitled to receive an additional 20,000 shares of stock on account of such legal services and that they might institute suit against the issuer to recover such shares.

The two stockholders contended that they have suffered unexpected reverses in their financial affairs since their income from law practice has declined, various loans which were outstanding at the time the shares were taken were called, the Internal Revenue Service has threatened enforcement action to collect Federal income taxes due for 1966, and they had to spend substantial sums to renovate their law offices.

However, such financial obligations existed at the time the stock was acquired. Furthermore, the repeated attempts to obtain a no action letter in September and October 1967 and March, May and June 1968, raise considerable doubt as to whether the stockholders ever had a bona fide investment intent.

Request denied.

CARD ONLY

July 3, 1968.
10:00 a.m.

Memorandum to:

MR. SHREVE
MR. BAGLEY
MR. LEVENSON
MR. MICHAELY
MR. HAGGERTY
MR. POLLACK
MR. SPORKIN
MR. ROTBERG
MR. BLOCK
MR. WILLIAMS
MR. MATHEWS
MR. HYMAN
MR. ROSSEN
MR. FINKELSTEIN
NEW YORK REGIONAL OFFICE

Re: *X Company*—Request of *Mr. A* and *Mr. B* for a "no action" letter re their proposed sale of *X Company* stock

Upon the recommendation of the Division of Corporation Finance contained in a memorandum dated June 28, 1968, the Commission denied a request made on behalf of *Mr. A* and *Mr. B* for a "no action" letter in connection with their proposed sale of 10,000 shares of common stock of *X Company* without registration under the Securities Act of 1933.

NELLYE A. THORSEN,
Assistant Secretary.

MEMORANDUM

June 28, 1968.

To: The Commission
From: The Division of Corporation Finance
Re: Request for a no-action letter for the sale of 10,000 shares of common stock of *X Company*
Recommendation: That the request be denied.

The Division has received a request on behalf of *Messrs. A and B* for a no-action letter for their proposed sale of 10,000 shares of *X Company* common stock.[19]

Messrs. *A and B* are associated as partners in the practice of law and the shares in question were received in February 1967 on account of legal services rendered to the issuer prior to that time. The shares were not registered under the Securities Act of 1933 but were issued in reliance upon the exemption afforded by Section 4(2) of such Act. It is alleged that *Messrs. A and B* are entitled to receive (but have not as yet received) an additional 20,000 shares of *X Company* on account of such legal services and that suit might be instituted against the issuer to recover these additional shares.

Messrs. A and B first requested a no action letter with respect to their X Company shares in September 1967 and this request was denied by the Division. They requested reconsideration of the matter in October 1967, March 1968 and May 1968 and in each case their request was denied. On June 3, 1968, they requested that the matter be reviewed by the Commission.

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[19] *X Company* common shares are traded in the over-the-counter market. The recent price is approximately $31 per share. The company has approximately 670,000 shares outstanding and *Mrs. C*, wife of *Mr. C* who is president of *X Company*, is the record owner of 405,000 of such shares.

Messrs. A and B allege in support of their request that they have suffered unexpected reverses in their financial affairs since February 1967 in that their income from law practice declined, various loans which were outstanding at the time the shares were taken have been called, the Internal Revenue Service has threatened enforcement action to collect federal income taxes due for 1966, and in that they spent substantial sums in renovating the building in which they maintain their law offices. According to the information submitted, the firm's obligations on the loans amount to approximately $150,000, and the taxes due amount to a total of $5,800.

The Division is of the view that a sale by Messrs. *A and B* of their *X Company* shares would not be consistent with an investment intent at the time the shares were taken. Indeed, it appears that the financial obligations that are relied upon in support of the request existed at the time the stock was acquired. Furthermore, the repeated attempts to obtain a no-action letter for the sale of these shares, initiated only eight months after their receipt, raise considerable doubt as to whether Messrs. *A and B* ever had a *bona fide* investment intent with respect to their shares.

There is an additional factor of which the Commission should be aware in considering this request. The New York Regional Office has advised that *Mr. A* had served as counsel for *Mr. C*, the president of *X Company*, as well as for other related corporations and they believe that he was aware of certain of *Mr. C's* activities in *X Company* which resulted in a suspension of trading of such issuer's securities on two occasions and also led to an injunctive proceeding against *Mr. C* and the issuer. Although the litigation has been terminated by the entry of consent decrees, the New York Regional Office is still reviewing the case in order to determine what further action, if any, should be taken in this matter, and does not believe that in the circumstances, a no-action letter should be granted.

For the reasons outlined above, the Division recommends that the request of *Messrs. A and B* for a no-action letter relating to their proposed sale of 10,000 shares of *X Company* be denied.
H. Garson

APPENDIX L–6

July 11, 1969.

Messrs. *A & B, Esq.*
—— *Broadway*
New York, New York 10005

Re: *X Company*

GENTLEMEN: This refers to your letter of June 6, 1969 concerning the proposed sale by your client, *Mr. C*, of 225,000 shares of *X Company* (the "Company") common stock, which shares were acquired at the following times: 10,000 in April, 1966, 140,000 on September 26, 1967, and 75,000 on April 26, 1968, representing 14.5% of the 1,550,600 shares of the Company's outstanding stock.

As more particularly discussed in your letter, *Mr. C* was a principal officer and director of the Company until his employment was terminated by the board of directors on April 23, 1969. He had no notice of this termination until immediately prior to its occurrence.

It appears that *Mr. C* has considerable financial obligations such that he is not able to maintain his investment in the Company without the compensation which would attend his full time employment as one of the company's principal officers.

Based on the facts presented, this Division will not recommend any action to the Commission if your client sells the shares in question without prior compliance with the registration requirements of the Securities Act of 1933 in reliance upon your opinion as counsel that the proposed transaction is exempt therefrom.

Sincerely yours,

JOHN HENEGHAN,
Assistant Chief Counsel.

bcc NYRO
HMcCart
BOROCHOFF (6)
7/10/69/mkt

October 2, 1967.
4:00 p.m.

Memorandum to:

MR. WORTHY
MR. BAGLEY
MR. SHREVE
MR. MICHAELY
MR. HAGGERTY
MR. LOOMIS
MR. FERBER
MR. NORTH
MR. I. POLLACK
MR. RAE
MR. ROTBERG
MR. SPORKIN
MR. FREEDMAN
MR. DUDLEY
MR. LEVY
MR. MOSTOFF
MR. ROUTIER
MR. KELLY
MR. M. MILLER
MR. O'TOOLE
MR. RUSSELL
MR. WEEKS
MR. GONZALES

Re: *X Company*—Request for "no action" letter with respect to proposed sales of certain securities

(Messrs. Shreve, Michaely, Loomis, Rae, Freedman and Mostoff were present.)

Discussion was had of the request of *X Company* for a "no action" letter relating to its proposed sales of the following companies without registration under the Securities Act of 1933: *Y Company, Z Company, P Company,* and *Q Company.* (See memorandum dated September 28, 1967, from the Division of Corporation Finance.)

Following a discussion, the Commission determined that the staff should request of counsel for *X Company* a written commitment that *X Company* would not in the future purchase any shares of United States management companies. (Counsel had advised the staff to that effect orally.) Subject to obtaining that commitment, the Commission granted the request for a "no action" letter with respect to the proposed sales of shares of *Y Company, Z Company,* and *Q Company.* The Commission indicated that it had problems concerning the request for a "no action" letter applicable to the sale of shares of *P Company*, and, accordingly, it declined to grant the request at this time.

NELLYE A. THORSEN,
Assistant Secretary.

APPENDIX L–7

July 31, 1968.

Mr. A, Esquire
C and A
Suite ______
____ Walnut Street
Philadelphia, Pennsylvania 19102

Re: *X Company*

DEAR MR. A: This is in response to your letter of July 9, 1968 requesting a no action letter in connection with the proposed sale of 5,006 shares of *X Company* by *Mr. B*.

Your letter states that *Mr. B* received his shares of *X Company* in exchange for his shares of *Y Company* on March 27, 1967, as represented by a temporary certificate for 424 shares issued on that date, and subsequently exchanged for a permanent certificate dated July 27, 1967, together with a certificate for the remaining 4,582 shares. *Mr. B* entered into an employment contract with *Y Company* on March 27, 1968. As a result of a breach of that contract in June, 1968 as well as the financial commitments of *Mr. B*, it is your opinion that the sale of these shares to the public should be exempt from the registration requirements of the Securities Act of 1933.

Based upon the above facts, as more fully set forth in your letter, we are unable to concur in your opinion. Accordingly, no public offer or sale of the shares of *X Company* by *Mr. B* should be made without compliance with the registration requirements of the Securities Act of 1933.

Sincerely yours,

WILLIAM E. TOOMEY,
Assistant Chief Counsel
Division of Corporation Finance.

LOgg/jlh
Branch #10—Whitney
July 31, 1968

APPENDIX L–8

July 6, 1967.
3:30 p.m.

Memorandum to:

MR. WORTHY
MR. BAGLEY
MR. SHREVE
MR. DAVIES
MR. MICHAELY
MR. SCANLAN
MR. HAGGERTY

Re: *X Company*—Proposed sale of stock by *Mr. A*

(Mr. Michaely was present.)

Consideration was given to a memorandum dated June 28, 1967 from the Division of Corporation Finance in regard to the request of *Mr. A* for a "no action" letter in connection with his proposed sale of 120,611 shares of *X Company* common stock. It was the Division's recommendation that the request be granted.

Upon due consideration, the Commission concluded that as a matter of policy it should not grant "no action" letters to any member of a family group which controlled the company in question. Accordingly, since *Mr. A* was a member of the family group in control of *X Company*, the Commission denied his request for a "no action" letter.

ORVAL L. DUBOIS,
Secretary.

APPENDIX L–9

August 15, 1967.
10:10 a.m.

Memorandum to:

MR. WORTHY
MR. BAGLEY
MR. SHREVE
MR. HOCKER
MR. MICHAELY
MR. DOLLET
MR. HAGGERTY

Re: *X Company*—Rule 133

(Messrs. Shreve, Michaely, and Huge were present.)

Consideration was given to a memorandum dated August 2, 1967, from the Division of Corporation Finance with respect to *X Company*, which proposed to acquire substantially all of the assets of *Y Company*, and of *Z Company*. In connection therewith, *X Company* would issue (a) 65,000 of its common shares to *Y Company*, which would be distributed to that company's two shareholders upon its dissolution, and (b) 6,795 of its common shares to *Z Company*, which would be distributed to that company's three shareholders upon its dissolution. The purchase agreements provided for the later issuance of additional shares to the selling companies, which would be similarly distributed.

The question was presented whether the recipients of the *X Company* shares would be free to sell the stock without registration under the Securities Act of 1933 pursuant to provisions of Rule 133 thereunder. The Commission declined to authorize the issuance of further "no action" letters in situations such as this pending a reconsideration of past rulings and interpretations in this area and the issuance by the Commission of further or amended rules.

ORVAL L. DUBOIS,
Secretary.

RECOMMENDATION NO. 20

SUMMARY DECISION IN AGENCY ADJUDICATION

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

RECOMMENDATION

§ 1 Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for agency hearing may, after commencement of the proceeding and at least __ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party may, within ____ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.

§ 2 The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§ 3 Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

§ 4 Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

§ 5 The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (*review authority*) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.

REPORT OF THE COMMITTEE ON AGENCY ORGANIZATION AND PROCEDURE IN SUPPORT OF RECOMMENDATION NO. 20

Prepared by
Ernest Gellhorn
Professor of Law
Duke University

INTRODUCTION

Delay is widely acknowledged as a major inadequacy of the administrative process. Administrative tardiness in deciding adjudicatory matters is no exception. This report for the Committee on Agency Organization and Procedure examines the suggestion that agencies adopt summary judgment procedures in an effort to speed the termination of formal administrative adjudications. While a definitive conclusion cannot be reached without substantial agency experimentation, it does seem clear that some type of summary judgment rule should be allowed in many agency practices.

Despite long recognition of delay as a frustrating problem of agency litigation, neither administrative law literature nor agency reports comment on summary judgment as a device to shorten it.[1] This seems surprising in light of the extensive application and commentary on summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Consequently, this report was prepared without the assistance (or the restriction) of prior administrative studies. Feeling the need for outside opinion, I prepared a draft rule and submitted it to agencies and experienced practitioners. Many responded. Unfortunately most of their replies reflected the age-old reaction to new ideas for controlling sin—"I'm all for summary judgment (in principle); it should work (in other agencies); but it is not needed in (my agency); in fact, its application to (my agency's) practice would only wreak havoc with our operations."

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[1] Professor Davis' sole comment, for example, is: "Some agencies might well take a leaf from the federal rules of civil procedure and permit summary judgment without evidence when no issue of fact is presented." 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.13 at 578 (1958).

In this report I have attempted to go beyond such surface impressions while still giving credence to well-founded objections. The draft rule has been revised and is recommended as one step toward terminating unnecessarily lengthy adjudications. It would be misleading to state that adoption of this proposal by all agencies or even its generous application in practice would substantially eliminate delay. I make this comment to retain perspective, not to excuse inaction. Every reasonable forward step should be taken if administrative delay is ever to be diminished. It is in this spirit that other suggestions, which I think merit further study, are also advanced.

I. The Civil Trial Analogue—Summary Judgment in the Federal Courts

Summary judgment has a long history. It originated in English procedures as a device for removing sham issues without the burden of a full-dress trial. *See* Bauman, *The Evolution of the Summary Judgment Procedure,* 31 IND. L.J. 329 (1956); *Richard* v. *Credit Suisse,* 242 N.Y. 346, 350, 152 N.E. 110, 111 (1926) (Cardozo, C.J.). It developed when the demurrer and motion for judgment on the pleadings proved inadequate (neither permitted the court to go behind the pleadings) and sanctions against groundless pleadings and denials were ineffective. Until summary judgment evolved it was relatively simple for either plaintiff or defendant to rely on paper issues which evaporated when proof was required at trial. *See generally* F. JAMES, CIVIL PROCEDURE § 6.18 (1965).[2]

The motion for summary judgment was developed as a pretrial procedure for eliminating inexcusable delay by limiting trials to disputed questions. As incorporated in Rule 56 of the Federal Rules of Civil Procedure (reprinted in Appendix A), summary judgment avoids a useless trial by making possible the prompt disposition of a case on its merits without formal trial, if in essence there is no real dispute as to the "material facts." Summary judgment may be applied to an entire case or limited to specified issues. It is effective because it permits a party to pierce the fact allegations in the pleadings by presenting material evidence which establishes that no dispute exists.

Under Rule 56 the motion is typically supported by affidavits, containing statements of fact and attaching documentary evidence, of witnesses who would be competent to testify. The party opposing the motion may submit counter-affidavits of similarly competent witnesses. In deciding whether to grant the motion, the court generally has two options: (1) To grant summary judgment if counter-affidavits are not submitted and the movant's pleadings and affidavits show, without contradiction, facts which would entitle the movant to judgment as a matter of law. However, the mere filing of counter-affidavits does not assure that a genuine issue exists. (2) To deny summary judgment if the pleadings and affidavits on file show that there is a genuine issue to be resolved by the trier of fact. A genuine issue exists whenever the question is one of disputed fact or of the characterization of admitted facts.

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[2] This review of summary judgment practice relies heavily upon F. JAMES, *supra,* and 6 J. MOORE, FEDERAL PRACTICE, ch. 56 (2d ed. 1966).

If the responses to my questionnaire accurately reflect the degree of agency and practitioner understanding of summary judgment procedure, both options need further explanation. In regard to the first option, the party moving for summary judgment has the burden of showing the absence of any genuine issue, and the material on file is viewed in the light most favorable to the adversary. Some courts contend that summary judgment should be granted whenever a verdict would be directed "on the record the parties have actually presented, not on one potentially possible." *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 147 F.2d 399, 405, (2d Cir. 1945) (Clark, J.). Others hold that summary judgment is inappropriate whenever the record indicates the possibility that new or different evidence might turn up at trial; "[a] litigant has a right to a trial where there is the slightest doubt as to the facts. . . ." *Doehler Metal Furniture Co.* v. *United States*, 149 F.2d 130, 135 (2d Cir. 1945) (Frank, J.). *See also Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946), discussed in 6 J. MOORE, *supra* at ¶ 56.17[14] and C. WRIGHT, THE LAW OF FEDERAL COURTS § 99 (1963). This verbal distinction is of minor influence. It serves to emphasize, however, that the grant of the motion is within the court's discretion and will be denied where sound reasons can be offered against its application even though the request is technically within the Rule's coverage. For example, where the evidence is exclusively within the moving party's domain, a motion for summary judgment is usually denied as a transparent device to avoid evidentiary tests of confrontation and cross-examination. *See, e.g., Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620 (1944); *Eagle Oil & Refining Co.* v. *Prentice*, 19 Cal. 2d 533, 122 P.2d

264 (1942). Courts seldom rely on summary judgment to decide cases involving complicated or voluminous evidence, especially when the legal question is new or significant. *Kennedy* v. *Siles Mason Co.,* 334 U.S. 249, 256–57 (1948). The Supreme Court has observed that summary disposition of "issues of public moment . . . not subject to probing by judge and opposing counsel is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguard of critical scrutinizing of facts, through the use of a declaratory summary judgment." *Eccles* v. *Peoples Bank of Lakewood Village, Calif.*, 333 U.S. 426, 434 (1948). Professor James' summary is persuasive:

> "Where there is something which points to a specific likelihood that trail will elicit evidence not otherwise available, denial of summary judgment might be warranted. But where trial is required 'only on the vague hope or suspicion that somehow some evidence may thereby the developed, the advantages of speed and early disclosure afforded by the summary judgment procedure are largely dissipated without a commensurate return of justice to the litigants.'" F. JAMES, *supra* at 236, quoting Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 COLUM. L. REV. 780, 785 (1948).

The second option, that summary judgment is inappropriate where opposing affidavits show that a substantial issue divides the parties, creates little trouble for most courts but is often misunderstood by agencies and agency practitioners. A substantial issue may exist even though the "basic facts"—those of what happened when and to whom, etc.—are not disputed. This may seem anomalous to the express provisions in Rule 56 which permit summary judgment whenever "material facts" are not disputed. In this context, however, "material facts" relate to two distinct and different functions performed by the trier of fact: (1) when he finds what the "basic facts" were; and (2) when he evaluates those facts in terms of legal consequences (finding "ultimate facts," drawing "inferences," or announcing "conclusions of fact"). The inapplicability of summary judgment when the parties dispute basic facts seems obvious. Fairness requires denial of summary judgment when the affidavit-supplied information is within the exclusive control of the moving party or cannot be contested because the information is not available to the opposing party.[3] The misunderstanding apparently arises from a failure to comprehend the wide judicial interpretation given the term "material facts." Courts have often ruled that "material facts" are disputed when the issue involves the legal consequences of conceded facts. This includes disputes regarding ultimate facts or inferences to be drawn from other facts. Two antitrust cases decided by the Supreme Court last term illustrate this construction of Rule 56. In *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 506 (1969), the Court denied a motion for summary judgment where the trier of fact was called upon to determine whether a business arrangement served a legitimate business purpose—ruling summary judgment inapplicable where an "ultimate finding of fact" is in dispute. Summary judgment was also refused in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700, 703 (1969), where the reasonableness of a business practice was in dispute—here ruling that the drawing of "inferences" is beyond the proper scope of summary judgment. *See also Pierce* v. *Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951) ("conclusions").

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[3] The most celebrated application of this limitation on summary judgment motions is "in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

Within these limits the cases applying summary judgment are legion (*see* 6 J. MOORE, *supra*), but little would be gained here by reciting this litany to Rule 56. As with any procedural rule it has occasionally been abused with the effect of adding to rather than eliminating delay. Yet in the vast majority of cases it involves little additional burden, is economical, and saves time for both the parties involved and the court. Even when denied it has often served to limit the issues for trial. Professor Moore, the foremost American authority on civil procedure, aptly summarized the general view that summary judgment has "operated successfully in all jurisdictions in which it has been adopted and the tendency has been to enlarge the scope of its operation. *Id.* ¶ 56.05, at 2072–73.

II. THE APPLICATION OF SUMMARY JUDGMENT TO ADMINISTRATIVE AGENCIES

The successful experience with summary judgment in civil litigation suggests its application to formal administrative adjudications. Administrative hearings are often indistinguishable from civil trials; in some civil cases, particularly antitrust prosecutions, even the distinctions of "administrative expertise" and less restrictive evidentiary rules have disappeared. *See United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349, 355–56

(D.Mass. 1950).[4] Unless differences between the administrative process and civil trials directly impinge on the grant of a motion for summary judgment, convenience, uniformity and reduction of delay suggest the adoption of a similar administrative rule. The available interpretative history—a record of cautious application—under Rule 56 would further implement its fair application to administrative adjudication.

Nevertheless, the touchstone of acceptability is: would adoption of a summary judgment rule in administrative proceedings hasten the termination of a substantial number of administrative trials? Unless the answer is yes or probably yes, there is no merit in further cluttering the Code of Federal Regulations with yet another rule or in adding to the procedural arsenal of attorneys seeking delay.

A. *Survey*

The basic idea of summary judgment obviously can be applied in administrative adjudications. The language of Rule 56, however, is often inappropriate. Agencies operate under different rules with distinct provisions for enforcing their compliance—thus, the enforcement provisions in Rule 56(g) (affidavits made in bad faith) appear unnecessary. The power of an agency differs from that of the district courts—for example, agencies usually render decisions, not judgments. Rules of practice vary substantially among agencies, and their terms of reference differ from those used by courts. Adjudicatory hearings range from informal conferences between an examiner and the parties to long and complex formal trials comparable to civil antitrust cases tried by a court. These and other distinctions limit any Administrative Conference recommendation to a model rule which an agency could modify to adapt to its own practices.

With these considerations in mind, I prepared a draft rule (Appendix B) authorizing "summary decision" procedures in formal adjudication. It covers only the essential elements of a summary judgment motion—namely, when it would be available; how it could be sought; and when the motion should be granted or denied. Increased flexibility was introduced through allowing any party to the proceeding the right to seek a summary decision any time within 20 days of the hearing date. Fairness was assured through permitting the opposing party sufficient time to prepare affidavits or to present discovery material in opposition to the motion. Administrative discretion was safeguarded by providing the presiding officer the power to grant the motion if there was "no genuine issue as to any material fact and that the moving party is entitled to such decision." The moving party, in other words, might be entitled to a decision as a matter of agency policy even though that decision was not required as a matter of law (as required by Rule 56(c)).

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[4] Some have even suggested that Federal Trade Commission antitrust hearings impose more rigid evidentiary rulings than are commonly applied in comparable civil cases. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 52-53 & n. 23 (1969). However, summary judgment is often unavailable in antitrust litigation where court and agency trials are most alike. See Page 6 *supra*. *But see, eg., Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488 (1942).

This draft rule was then submitted to over 20 agencies and departments conducting formal adjudicatory hearings. Agencies were asked to describe the operation and effectiveness of current rules concerning summary disposition and to criticize the draft rule. Comments were also solicited from knowledgeable private practitioners.

Although the negative responses of many agencies and practitioners were disappointing—especially since most of their letters simply recited vague conclusions unsupported by analysis or specific example—other responses proved helpful in calling attention to possible problems and arguments which merit consideration and in proposing modifications to the draft rule. Since there seems to be general agreement that the principle of summary judgment is sound and should apply to agency procedures, the following analysis proceeds in two steps. First, the problems or objections which would affect several (or all) agencies are considered. There are, of course, some costs involved in the use of summary proceedings, but the foundation of most objections to it disappears when the operation of a summary decision rule is understood. The second step examines agency experience with summary judgment procedures and possible difficulties arising from its application to particular agencies.

1. *General Observations*

Several objections to the draft rule—namely, that it would abridge the right to a hearing, that it would unfairly shift the burden of proof, and that it would render the right to an administrative hearing meaningless—are, in essence, an attack upon the theory of summary judgment. They argue that procedural devices to shorten trials or to permit summary disposition are anomalous and unfair. Why, they ask, should a hearing be permitted on the one hand and cut short on the other? A right to be heard means, at the least, the right of a party to present evidence and to test that offered by his adversary. Summary judgment rules abridge that opportunity. With a full trial other facts might be brought to light; or cross-examination might reveal the weakness of the movant's case. This concern is particularly acute in administrative hearings which are created to avoid the formalities of judicial trials and to provide an inexpensive alternative, but which necessarily sacrifice some of the formal protections offered in a court trial.

The short yet complete answer to these protests is that summary judgement would be granted only when the pleadings, affidavits, etc., clearly revealed that an evidentiary hearing would serve no useful purpose. Summary judgment honors the right to be heard by allowing the party opposing the motion to show that a trial is necessary and by placing the burden of proof on the party seeking summary disposition; it protects fairness by relieving the parties of the burdens of a trial where it is reasonably clear that the ultimate decision will be based on evidence that can best be presented without testimony. Summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide:

> No one is entitled in a civil case to a trial by jury unless and except so far as there are issues of fact to be determined. *Ex parte Peterson,* 253 U.S. 300, 310 (1920).

A rule allowing summary disposition of administrative adjudications likewise would not improperly deny hearing rights when it allows the hearing examiner or agency to dispense with an evidentiary hearing that could not affect the decision.

Another series of supposed problems, and by far the longer list, advanced in opposition to the adoption of a summary decision rule stems from misconceptions of the potential application of the draft rule. In some agencies hearings are informal and parties either try their own cases (*e.g.,* government contract disputes) or appear without counsel (*e.g.,* public land contests, Indian probate proceedings). In these instances summary disposition by motion would take unfair advantage of the parties' lack of legal training. Moreover, the rule is not needed in these cases since such hearings generally consume little time. A summary procedure is, however, appropriate where parties rely on counsel or the proceedings become, as a practice, protracted. The draft rule is designed (as our letter to the agencies specified) for formal, on-the-record hearings.

More serious, however, is the objection to agencies borrowing summary judgment procedures from district courts unless they also include the full panoply of discovery currently available under the Federal Rules (which most agencies have not done). Without discovery the party opposing the motion may not be able to present facts which show that the case should go to trial. Again, concern centers upon the fairness of the summary technique. Yet the current federal discovery rules are not the only standards of the necessary minimum opportunity. The contention calls for an examination of each agency's rules: do they allow a party opposing a summary decision motion sufficient opportunity to obtain defensive facts?[5] In any case, this objection misconceives the operation of the rule. The lack or restriction of discovery merely limits an agency's opportunity to apply the rule which may impair the rule's usefulness but not its fairness. As noted earlier, summary judgment has long been denied where the party opposing the motion is barred from access to rebuttal information (pages 4–6, *supra*). Moreover, the draft rule specifically prohibits (as does Rule 56(f)) summary decision where the "party opposing the motion [shows] that he cannot for reasons stated present . . . facts essential to justify his opposition. . . ." (§ 4).

Other agencies object to the draft rule because many of their adjudicatory hearings involve disputes decided by demeanor evidence (*e.g.*, unfair labor charges), are determined by inferences, or depend on economic policy judgments (*e.g.*, electric and gas utility rate and pipeline decisions). Still others object to the large number of parties involved and to the complexity of some agency proceedings (*e.g.*, airline route allocations). Again these objections are based on erroneous conceptions of the purpose and function of the draft rule. The rule would not displace full hearings where basic facts are in dispute and where their resolution involves a question of witness credibility. There are well recognized precedents for not applying the rule where the litigation is complex, or the disputed issue involves the evaluation of conceded facts in terms of legal or policy consequences. Therefore, unless almost every adjudication could be characterized in this manner, a rule permitting summary disposition would still seem desirable. In fact, even if all cases involved drawing conclusions or applying economic policy, summary judgment would still avoid unnecessarily protracted hearings wherever such rulings are governed by established principles or previously developed policies. At the least the draft rule could effectively limit the issues to those to which application of summary disposition is not appropriate.

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[5] The second interim Administrative Conference urged agencies to improve and extend their discovery procedures. *Recommendation No. 30*, S. DOC. NO. 24, 88th Cong. 1st. Sess. 63 (1963). A proposal to implement and enlarge this suggestion will come before this Conference soon. *See* Tomlinson, *Discovery in Agency Adjudication*, REPORT FOR COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS (January 1970).

A number of agencies contend that the proposed summary decision rule duplicates their present rules of practice. This was initially heartening since one reason for canvassing agencies for their opinions was to determine whether they had developed alternatives to the summary decision approach. Their alternatives, however, proved disappointing. Several agencies note that their procedures provide for motions to dismiss for lack of jurisdiction and for failure to state a claim upon which relief could be granted (similar to Federal Rule 12).[6] To the extent that summary judgment is based solely upon the pleadings, these agency rules accomplish the ends sought by the draft rule. However, the draft rule (Rule 56) goes further. Not only does it allow the claimant to seek a summary decision (which a motion to dismiss does not), but it also allows the parties to present and the examiner to consider matters outside the pleadings in deciding the motion.[7] The success of these agencies' motion practice supports, in fact, the adaptability of the summary judgment rule to the procedures of administrative agencies. Others contend that their prehearing conference rules (similar to Federal Rule 16) and methods for stipulating facts (see Federal Rules 33 and 36) accomplish the purposes of a summary decision rule. But such rules serve only to complement summary judgment motions. Each is adapted to its own special purpose and does not take the place of the other. Prehearing conference rules, for example, do not authorize (and are not used by) the hearing examiner to render summary decisions. More significantly, the use of prehearing conferences is often discretionary with the trial examiner whereas the right to invoke the draft rule is vested in the parties. Stipulations depend upon the willingness of the parties to agree. Summary judgment, on the other hand, depends on what a party can prove or disprove.

Finally, several practitioners recommend as an alternative device that hearing examiners and agencies be required to meet specified time deadlines. Some agencies have moved in this direction, ordering hearing examiners to conduct trials expeditiously, at one place and without interruption (*e.g.*, FTC, 16 C.F.R. §3.41(b) (1969)). Their decisions are required to be filed within 90 days after the closing of the trial record (*id.* § 3.51(a)). Although one cannot quarrel with any effective method of speeding administrative adjudications, it seems doubtful that the application of rigid time deadlines could do more than eliminate certain sore spots of delay. They do not eliminate unnecessary trials and, again, only complement the summary decision rule.

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[6] Most commonly, such motions are available where the proceeding is initiated by a private party (*e.g.*, government contract disputes) rather than an agency.

[7] This distinction is particularly important in administrative proceedings because "[t]he most important characteristic of pleadings in the administrative process is their unimportance." 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.04 (1958).

Although advanced only by one agency, many agencies might offer the argument that the motion for summary judgment is inappropriate where the agency has initiated the proceeding because it has already found that "probable cause" exists and that an adjudication is in the "public interest." *See generally* French, *The Federal Trade Commission and the Public Interest*, 49 MINN. L. REV. 539 (1965). Under this theory the Federal Trade Commission has long denied its examiners authority to dismiss complaints without a hearing. *E.g., First Buckingham Community, Inc.*, 3 TRADE REG. REP. ¶ 18,357, at 20,726–27 (FTC 1968).[8] It has made the determination that unless the factual record reveals otherwise, the complaint states a claim upon which relief can be granted and there is *prima facie* evidence that prosecution is warranted. *See* 16 C.F.R. § 3.22 (1969). On the other hand, this determination is made by the agency after reviewing the evidence on only one side as presented by its staff; the absence of any violation, even as a matter of law or policy, may become clear from counter evidence (although presented only in affidavit form). When it is realized that despite this preliminary Commission finding about one-third of the appeals decided by the FTC result in dismissals of the complaint[9] (*see* Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653 (1965)), the potential value of summary judgment as a device to avoid delay becomes apparent. The power of summary decision, moreover, is double-edged; it can be applied affirmatively by the agency against respondents and thereby effectively limit their delaying tactics which have become the despair of commissioners and critics alike. This objection to summary judgment, then, like the right-to-jury-trial objection, is far from convincing.

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[8] Adoption of a summary decision rule would not necessarily authorize a trial examiner to dismiss because of lack of "public interest," as the examiner sought to do in *First Buckingham;* this may be a question of discretion for the agency and not its examiners.

[9] Technically the "public interest" limitation on FTC complaints applies only to prosecutions brought under § 5 of the FTC Act. *See Webb-Crawford Co.* v. *FTC*, 109 F.2d 268, 269 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940). As a matter of practice, however, it appears that this "public interest" standard, to the extent it has any special impact at the complaint issuance stage, is not applied differently to § 5 complaints. *See, e.g.*, Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 418–24 (1964).

Another and perhaps more serious hurdle posed by several agencies to the adoption of the summary decision rule is a statutory requirement making their hearings "mandatory." Among those pointed out were:

(1) Atomic Energy Act, 42 U.S.C. § 2239(a): requires the AEC to hold a hearing on applications for permission to construct nuclear power reactors.

(2) Civil Service Commission, 5 U.S.C. §§ 1505, 7701: provide that in employee appeals or in political activity cases of State and local employees, the employee is "entitled to appear personally or through a representative" and a decision is to be rendered "after this hearing."

(3) Immigration and Nationality Act, 8 U.S.C. §§ 1226, 1252(b): specify that in exclusion and deportation cases that "the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government."

(4) Federal Communications Act, 47 U.S.C. §§ 201(a), 204, 205(a), 209, 213(a), 214(b), (d), 221(a), (c), 222(e) (1), 303(f), (m) (2), 309(e), 312(c): variously provide that the Commission may act "after hearing and notice" or an "opportunity to be heard."

(5) Federal Power Commission issuance of hydroelectric licenses under Part I of the Federal Power Act and certificates of public convenience and necessity under the Natural Gas Act, 16 U.S.C. §§ 797(e), 803(a); 15 U.S.C. § 717 (e), (f): require FPC approval based on a finding that the public interest will be served.

The Armed Services Board of Contract Appeals also noted that introduction of a summary decision rule would require amendment of the long used disputes clause which grants a contractor the right 'to be heard and to offer evidence in support of this appeal."

Closer examination of each of these provisions reveals that with the exception of the Atomic Energy Act[10] they do not pose barriers to the draft rule. Their statutory language (or judicial interpretation) makes no evidentiary hearing mandatory where there is no factual dispute. On the contrary, agency argument repeats erroneous "right to a jury trial" contention which was rejected when posed as an obstacle to summary judgment in civil cases. (*See* page 10, *supra.*) There may, of course, be other good reasons for not adopting the summary approach in these administrative hearings. Civil service and deportation hearings may be so informal and conducted without counsel, that summary disposition would be inappropriate. Or the symbolic value of making available to consumers the opportunity to participate in hearings on the location of hydroelectric plants may override the consideration of the summary decision technique.[11] Nevertheless, statutory or contractual rights to a hearing cannot reasonably be interpreted as prohibiting the use of summary judgment by an agency to cut short futile evidentiary hearings.

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[10] Although the language of the Atomic Energy Act arguably allows summary decisions, the legislative history and common understanding make clear that hearings are mandatory at the construction permit stage. Murphy, *Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions*, 33 LAW & CONTEMP. PROB. 566, 574–77 (1968); *see* Cavers, *Administrative Decision Making in Nuclear Facilities Licensing*, 110 U. PA. L. REV. 330 (1962); Davis, *Nuclear Facilities Licensing: Another View*, *id.* 371; Cavers, *Nuclear Facilities: A Word More*, *id.* at 389.

Even though most objections to the draft rule lack substance, this does not mean that adoption of a summary judgment rule in administrative adjudication would be entirely free from risk or cost. As with any procedural device designed to more rapidly terminate proceedings, the motion for summary decision could become just another avenue for delay. A party could submit motions to postpone hearings and to increase an adversary's burden. Or he could hope that an examiner or agency would deny his adversary a rightful evidentiary hearing (thus increasing the total time required to settle the matter through additional intermediate judicial review). Nor would the benefits be as great if, as some practitioners fear, examiners "played it safe" and decline to grant summary decision merely because they were apprehensive of a reversal.[12] But this risk does not seem overwhelming and should be balanced against the potential gain. Each agency would have to decide whether summary procedures would be appropriate in any of its adjudicatory hearings. If the answer were yes, it should quickly establish the necessary ground rules to assure that the new motion speeds rather than delays adjudications. For example, examiners could be required to rule on such motions within narrow time limits; no interlocutory appeals need be permitted from denials; etc. Courts likewise could curb excessive agency zeal in granting such motions. In substance, then, the motion for summary decision has the limitations as well as the potential of most procedural devices; it does not rule out man's infirmities or capacities.

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[11] See *City of Allegan County* v. *FPC*, 414 F. 2d 1125 (D.C. Cir. 1969) (approving summary decision dismissing complaints of citizens to merger of electric facilities).

[12] This result would be disappointing, but further delay would not necessarily follow unless the examiner's denial is subject to interlocutory appeal. As is noted later, the draft rule takes no position on whether denial of summary decision should be reviewable in this manner. *See* page 29, *infra*.

2. *Agency Experience and Expectations*

Even though sometimes unaware of the fact, over one-quarter of the agencies surveyed have some kind of summary judgment rule already in effect.[13] Without exception their experience with it has been satisfactory. On the other hand, the majority of those agencies which do not permit summary disposition of adjudicatory hearings suspect the draft rule.

Agencies have traveled different routes in opening their rules of practice to summary judgment procedures. The most striking course is that followed by the Maritime Administration of the Department of Commerce. Their rule, developed at the suggestion of Judge Prettyman when he was chairman of the Second Interim Administrative Conference, was drafted along the lines of Rule 56 with the exception that it allows any party or prospective party (if a motion to intervene has not yet been acted upon) to file a motion for summary disposition only prior to the prehearing conference. In addition, it authorizes the presiding officer to rely upon "matters of official notice" [14] as well as pleadings and discovery in determining whether there are any material facts in issue. It also permits interlocutory appeal as a matter of course from a denial as well as a grant of the motion. 46 C.F.R. § 201.91–.93 (1969). Those familiar with the Maritime Administration agree that the procedure, although used sparingly, is desirable. They note that even when it is denied, the motion has the salutary effect of winnowing out irrelevant issues. *See American President Lines, Ltd., U.S. Mainland/Hawaii Service,* Maritime Administration Dkt. No. S–191 (Hearing Examiner Order Sept. 30, 1966). The Federal Maritime Commission relies upon a "show cause" proceeding to obtain speedy disposition of cases not subject to dispute of fact. This procedure, however, is more restricted since summary disposition is available only at the agency's option.

Another method, namely that used by the National Labor Relations Board, is to allow unlimited motion practice (29 C.F.R. §§ 102.23–.27) and to grant trial examiners broad powers in ruling on such motions (*id.* §§ 102.35(g), (h), (k)). Perhaps because the NLRB's rules fail to specify that summary judgment is available, respondents have apparently submitted only motions for judgment on the pleadings. The NLRB's General Counsel, on the other hand, has avoided relitigation of representation questions in unfair labor practice hearings by seeking the equivalent of a summary judgment motion.[15] *See, e.g., Pepsi-Cola Bottling of Miami, Inc.*, 153 N.L.R.B. 1342 (1965), *aff'd per curiam*, 373 F.2d 31 (5th Cir. 1967). While reaffirming the advantages of this practice, the NLRB opposes the draft rule on the grounds that the rule duplicates the Board's pretrial conference procedures, unfair labor practice proceedings usually involve questions of credibility determined by demeanor evidence, and the proposal would require pretrial disclosure of witness names and statements, thereby unfairly subjecting employee witnesses to potential intimidation. These objections may limit the application but not the adoption of the rule. (*See* pages 13–15, *supra*.) The Board further argues that interjecting a "broad summary judgment procedure would necessitate a delay or postponement of the hearing while responsive motions are filed, and [an] opportunity is provided to supplement the motion and to engage in the other time-consuming activities necessarily inherent in summary judgment procedures." [16] Letter from Chairman Frank W. McCulloch, NLRB, to Chairman Jerre S. Williams, Administrative Conference of the United States, October 1, 1969. Why summary judgment motions would "create havoc in the hearing calendar" while other motions available under the NLRB's unlimited motion practice do not is far from clear. In any event, other techniques are available to prevent inordinate delay—*e.g.*, by providing that no hearing shall be postponed if the party opposing the motion certifies (with the support of a brief summary of expected testimony) that the moving party's evidence will be disputed, etc. The potential witness intimidation argument is equally fanciful because: (a) if it poses a substantial threat, the draft rule provides (in § 4) for denial of the motion when the party opposing it establishes that he cannot support his opposition by affidavit; (b) in point of fact it seems unrealistic to assume such a threat actually exists in many cases—the presumption being, on the contrary, in the opposite direction, with the parties being allowed to show in a particular case that it existed; and, (c) this same argument was advanced time and again (only to be rejected) when courts and agencies first considered whether to open their doors to discovery. Judge Kaufman spelled out the answer several years ago:

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[13] Other agencies have abbreviated procedure rules under consideration as a result of the distribution of the original draft rule. The FTC recently adopted a summary decision procedure as new § 3.24 of its Rules of Practice. 35 Fed. Reg. 5007–08 (March 24, 1970). Because it unnecessarily cloaked this rule change in secrecy, the FTC rule generally follows my original draft rule and does not, for example, specifically authorize the examiner to consider matters which can be officially noticed in ruling on the motion.

[14] The Department of Transportation also suggests that the draft rule be expanded to include matters officially noticed.

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[15] Before ruling upon the General Counsel's motion, an order to show cause is served on respondent to provide him with an opportunity to establish the existence of a litigable issue. See NLRB FIELD MANUAL § 10282.1.

[16] One suspects that if pressed the Board would concede that the real basis of its concern is that an explicit rule would call the device to a practitioner's attention and the General Counsel's current advantage would be lost.

> The only explanation that I have seen is the old buga-boo rejected by the Federal Rules, that all litigants should be treated as though they were Al Capone; that they are not to be trusted with the names of adverse witnesses in advance because they will intimidate them and force them to withhold testimony or to perjure themselves. It is assumed that the criminal sanction is not enough to deter these litigants or their attorneys. Even if it were true that this danger is more than the remotest possibility, although the absence of criminal prosecutions and the experience of the Justice Department in civil litigations against these same defendants suggests that it is no more than that, I would still think that the public value involved in the prompt disposition of the majority of cases and in having an aboveboard procedure, would far outweigh the value of concealment. When a hearing examiner who subscribes to the concealment philosophy admits that to accommodate this view he is forced to follow a procedure which is "both stupid and cumbersome," that is almost reason in itself for abandoning it.
>
> The use of "stupid and cumbersome" procedures which result in inordinate delay, vast expense to both the Government and private parties and a huge record which renders sound and careful judgment virtually impossible, for the sake of avoiding some remote danger, illustrates the rigidities into which the administrative process has settled. Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View*, 12 AD. L REV. 103, 115–16 (1959).

Similarly, the various Boards of Contract Appeals have by decision expanded motions for judgment based upon the admission of essential facts and treated them as "the equivalent of a motion for summary judgment." *E.g., Liberty Coat Co.,* 57–2 B.C.A. ¶ 1576 (Army Appeals). Their justification is familiar:

> The purpose of this Board is to afford a just, inexpensive, and, to the extent permitted by circumstances, quick determination of unresolved disputes between contractors and contracting officers, without unnecessary technicalities. We are charged to construe all pleadings so as to do substantial justice.
>
> The essential facts disclosed by the pleadings and recited above are not new before this Board, although details, names, and contract numbers differ. *Id.* at 5,670.

Once again, however, no express rule provision sets forth the availability of summary judgment. Because of the similarity of practice and the interchange of those appearing before various Boards of Contract Appeals, it was suggested by the one agency which thought the idea feasible that a uniform rule adapted to Board practice should be adopted for all through the National Conference of the Boards of Contract Appeals.

Two agencies, namely the Interstate Commerce Commission and the Civil Aeronautics Board, have extensive experience under rules requiring abbreviated written procedures. Thus they have adapted the essence of the proposed summary decision rule to the peculiarities of their practice. Since the early 1920's, the ICC has dispensed with oral testimony under its "shortened" and "modified" procedures.[17] Over the years, the Commission has revised and further developed specific rules and techniques for eliminating evidentiary hearings except where material facts are disputed or their development in an oral hearing is considered essential. These procedures apply to ratemaking, licensing and regulatory cases and are available at the Commission's initiative or upon its approval of a party's request. A full discussion of these individualized responses to the particular needs of the wide variety of adjudicatory proceedings conducted by the ICC is beyond the scope of this report.[18] A list of the rules, examples of their applications and citations of cases illustrating various techniques includes: 49 C.F.R. §§ 1100.45–.54, 1100.247 (1969) applied in *United Towing Service*, Dkt. No. MC–133114 (Sub-No. 2) (ICC Aug. 19, 1969); *General Policy Statement Concerning Motor Carrier Licensing Procedures*, Ex Parte No. 55 (ICC May 3, 1966), applied in *John Novak*, Dkt. No. MC–128085 (ICC Jan. 23, 1967); *J. J. Willis Trucking Co.*, Dkt. No. MC–107993 (Sub–No. 15) (ICC Sept. 18, 1969); *Bowman Transp., Inc.*, Dkt. No. MC–94201 (Sub-No. 55) (ICC May 5, 1966). These procedures have also been upheld against attacks that they transgress rights protected by the Due Process clause or granted by the Administrative Procedure Act. *E.g.*, *Allied Van Lines Co.* v. *United States*, 25 Ad. L.2d 938 (C.D. Cal. 1969).

The CAB permits motions to dismiss, declaratory orders and disclaimers of jurisdiction (a specialized variety of declaratory order) where there is no factual disagreement between the parties. *E.g.*, 14 C.F.R. § 302.18 (1969). These mechanisms, which parallel the proposed summary decision rule, have been used in a broader fashion than similar judicial rules due to their application to economic as well as legal policy disputes. *See, e.g., United Airlines, Inc.,* Dkt. No. 20608 (CAB Order 69–4–67, adopted February 17, 1969, approved by President April 11, 1969) (jurisdiction disclaimed); *Alaska Airlines, Inc.,* Dkt. Nos. 18293, 18408 (CAB Order 69–8–154 April 29, 1969) (petition for declaratory order dismissed); *KLM Royal Dutch Airlines,* Dkt. No. 18138 (CAB Order E–25313 June 19, 1967) (motion to strike granted in part). The CAB's rules, in addition, provide for supplementing pleadings by affidavit in order to limit the conflict to matters other than facts. Examples include applications for exemptions (14 C.F.R. § 302.400 (1969)), applications for special operating authorizations (*id.* § 302.1020) and applications for delivery service to locations not previously authorized (*id.* § 222.3). As the Board correctly points out, these procedures "are not so much 'summary judgment' procedures for the determination of nonfactual disputes as they are abbreviated written procedures for the determination of policy issues on the basis of facts, the ascertainment of which, although perhaps in dispute, will not be enhanced by hearing procedures." Letter from Acting Chairman Whitney Gillilland, CAB, to Chairman Jerre S. Williams, Administrative Conference of the United States, October 6, 1969.

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[17] Introduced in 1922, the shortened procedure dispensed with oral testimony upon the consent of all parties. *See, e.g.*, *Mason* v. *Missouri, K. & T. Ry.*, 77 I.C.C. 633 (1923). Incorporated into ICC rules in 1927, approximately 35% of all formal complaints were handled by this method between 1930–35. The modified procedure consisted of the submission of memoranda in an attempt to obtain the parties' agreement upon as many facts as possible in order to confine oral testimony to disputed points. *See, e.g.*, *McCormick Warehouse Co.* v. *Pennsylvania R.R. Co.*, 95 I.C.C. 301 (1925). As originally employed, it did not prove successful.

[18] For an earlier description, see Woll, *The Development of Shortened Procedure in American Administrative Law*, 45 CORNELL L.Q. 56, 62–66 (1959).

The ICC and CAB have enjoyed considerable success with their individual procedures. Neither favors the application of the draft general rule to its proceedings since such action would result in either duplicate current procedures or in summary judgment motions becoming available where agency experience suggests that they are inappropriate. Their examples suggest a preferable alternative to the draft rule.

One might expect that agency interest in the draft rule would depend upon the type of delay the agency encounters and whether that delay would be amenable to correction by adoption of a summary decision procedure. The greatest incentive for delay in agency adjudication seems to arise in complaint cases (where the action is initiated by the agency for alleged law violations) especially when punishment is limited to injunctive relief. Agencies plagued by such delays then should normally favor summary procedures because summary judgment could attack insubstantial defenses. Again, there should be less pressure for delay and, correspondingly, less need for summary techniques, in arbitration cases (disputes between private parties) or application hearings (requests for government licenses, claims, etc.) where agency action does not seriously impinge upon other economic interests. However, agency reaction did not follow the logic of this reasoning. Federal Trade Commission prosecutions would be expected to be precise illustrations of complaint cases where summary judgment would be appropriate, yet replies to two requests for information revealed only that FTC rules are being studied by its staff and that it felt comment would be inappropriate at this juncture. Motor carrier licensing by the Interstate Commerce Commission, on the other hand, has long been subject to summary procedure even though there appears little likelihood for delay.

Consequently, I think, that little can be gained from listing the many idiosyncratic responses by particular agencies to the survey spelling out why they did not favor the summary decision rule. The responses to this survey clearly indicated that if the draft rule is recommended to administrative agencies it should be done so as a model for formal adjudicatory proceedings accompanied by a suggestion that the agency (a) modify the rule to meet the needs of its own hearings and (b) adopt the rule or some modification of it unless some overriding reason, going to the essence of the rule, makes other action mandatory. And to the extent that evidence from experience is available, it is the considered judgment of those agencies which have relied upon summary decision procedures that its rules have contributed materially to a reduction in the time spent on adjudicatory hearings.

B. *Recommendation*

As a result of further study, survey responses, and advice from Committee members, the conference staff and faculty colleagues, I have rewritten the proposed rule. Obviously all suggestions could not be incorporated since many were contradictory. I deliberately focused on the time in which the motion should be filed or answered because this seemed one area where individual agency needs and flexibility could be honored. Except where simplifications was possible, the language of Rule 56 of the Federal Rules of Civil Procedure was followed so that its interpretative history could be relied upon by agencies and practitioners alike. This rule is offered as a model. Since the purpose and scope of agency adjudication is almost unlimited, this proposal can serve only as a starting point for agency action. Each agency should modify the rule to meet its needs and practices. The recommended rule is:

Motion for Summary Decision

§ 1 Any party to an adjudicatory or rate-making proceeding may, after commencement of the proceeding and at least ______ days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party, may, within ______ days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for oral argument and call for the submission of briefs.

§ 2 The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

§ 3 Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a geniune issue of fact for the hearing.

§ 4 Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

What follows is a brief analysis of the model rule permitting motions for summary decision in administrative hearings.

Scope of Rule. This rule is applicable to all formal administrative adjudications and rate-making hearings. Summary decision procedure is a method for promptly disposing of proceedings in which there is no genuine issue as to any material fact. A similar rule has been available in all federal civil actions since the adoption of the Federal Rules in 1938.

§ 1 Filing of motion and answer; hearing. Any party may file a motion for summary decision of all or any part of the proceeding without restriction except shortly before the hearing. The time limit for filing a motion prior to the hearing is left open because the time schedule for pleadings, discovery and prehearing conferences varies widely between agencies. In fact, some agencies may want to require that such motions be filed before the first prehearing conference.[19] Other agencies currently allowing motions for summary decision do not require that the motion be filed substantially before the hearing commences (as does Rule 56), although the rule's impact would not be affected if an

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[19] The Maritime Administration's rule so provides.

agency so decided. The rule separately identifies its application to rate-making as well as to adjudicatory proceedings because the former constitutes rulemaking, not adjudication, under the Administrative Procedure Act. (5 U.S.C. § 551(4) (Supp. IV 1965–68). A party against whom summary decision is sought has the same power to move for summary decision in his favor. A hearing with or without oral argument or briefs may be held by the presiding officer, in his discretion, on the motion for summary decision.

§ 2 *Ruling on motion.* The moving party has the burden of clearly establishing his right to summary decision. The presiding officer's discretion is circumscribed. He is required to deny the motion where a genuine issue of material fact exists. A genuine issue of material fact exists when the question is one of disputed fact or involves the characterization of admitted facts. In either of these instances further development on the record is required. The presiding officer is not required to grant the motion even though no genuine issue exists if justice or sound policy would be served. In determining whether to grant the entire motion or any part of it, the presiding officer should consider not only the affidavits submitted with the motion but also the pleadings, any materials in the case file, and matters which can be officially noticed (subject to the requirements of § 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e)). Since many agency decisions involve primarily questions of policy and not law, the presiding officer may grant the motion if he finds that the moving party is entitled to summary decision as a matter of policy or law.

§ 3 *Affidavits.* Although not as prolix as Rule 56, the form of affidavit required follows the federal rule. It also makes clear that the function of summary decision procedure is to go beyond the pleadings and present matters by affidavit or by other extraneous materials to show that there is no genuine issue of material fact.

§ 4 *Rebuttal affidavits unavailable.* This section allows a party opposing a motion for summary decision to show why he is unable to present "by affidavit facts" which measure up to the evidentiary standard of § 3. The presiding officer is authorized to make such disposition as is just under the circumstances.

The proposed rule takes no position on whether an agency should permit interlocutory appeals from denials of all or part of a motion for summary decision. (A grant of a motion applicable to the entire proceeding is, of course, automatically appealable in the same manner as any other final decision issued by the presiding officer.) Again this is a matter peculiar to each agency's practice and best governed by its interlocutory appeal rules. Automatic review could, however, readily change the motion from a milestone to a millstone in the battle against delay. On the other hand, where interlocutory appeals can be handled quickly and would not contribute to delay, there are obvious advantages in obtaining immediate agency direction, especially when an evidentiary trial is thereby avoided. Agencies currently using summary judgment procedures have taken both routes. The most promising technique may be to allow presiding officers to certify to the agency important rulings "as to which there is substantial ground for difference of opinion . . . [when] an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." 28 U.S.C. § 1292(b) (1964). The problem of interlocutory review in administrative adjudications is complex. Therefore I think it warrants further study before a specific recommendation is offered.[20]

Adoption of this rule is within an administrative agency's authority. It was felt the administrative process as originally conceived would yield prompt determinations. Agencies were expected to create flexible procedures which would avoid the outmoded rigidities of courts. These hopes were expressed in section 6(a) of the APA which provides that every agency shall proceed within a reasonable time to conclude any matter presented to it, giving due regard to the convenience and necessity of the parties. In addition, section 7(c) provides agencies with authority to adopt procedures allowing for submission of evidence by affidavit. Most enabling statutes also authorize the agency to adopt such rules and regulations as are necessary to implement and carry out the purposes of the act.

CONCLUSION

The function of this model summary decision rule, in its broadest application, is to avoid a useless hearing. It promotes decisions on the merits without a trial where no genuine issue of material fact exists. More narrowly, it is designed to operate as a pretrial determination of what material facts do exist without substantial controversy and what material facts are actually and in good faith controverted. The party moving for summary decision has the burden of establishing through a written record that no triable issue exists; and he has this burden even with respect to issues upon which the opposing party would have the burden at a hearing. The moving party's papers should be carefully scrutinized, while the opposing party's papers, if any, should be treated with considerable indulgence. In determining whether to grant the motion, the presiding officer should give due weight to the need for cross-examination (which is unavailable to test affidavit evidence), to the general desirability of demeanor testimony, to the opposing party's access to proof, and to the desirability of a full exploration at an evidentiary hearing. *See* 6 MOORE, FEDERAL PRACTICE ¶ 56.23 (2d ed. 1966).

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[20] For a more extensive suggestion regarding the interlocutory appeal procedures of one agency, *see* Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 180–83 (1968).

The impact of the summary decision rule on administrative delay cannot be assayed in advance. Nevertheless, the experience of a few agencies and of the federal courts with a similar rule leads to only one conclusion: it should be experimented with by administrative agencies.

One final note. While engaged in this study I conversed and corresponded with many agency officials (commissioners, hearing examiners and trial attorneys) and agency practitioners as well as those who view agency processes from the academic fortress. Everyone preferred suggestions for attacking delay. In most instances these solutions were generated by unhappy experiences; but often the cures suggested would have created additional problems. One lesson did come through, loud and clear, however. The problem of delay in agency adjudication has innumerable causes and probably requires a like number of remedies. Nor is one agency's experience necessarily related to another's. Since agency adjudication covers such a wide variety of situations, the utility of cross-agency studies or uniform solutions is very limited or, perhaps, has been exhausted. This point can be illustrated by looking briefly at several ideas which I think might be useful in eliminating delay in complaint cases (where adjudication initiated by the agency tests whether the respondent has violated a statutory command): (1) Upon filing the complaint the agency should be empowered to issue a preliminary injunction with the burden on the respondent to show cause why such relief should not continue during the hearing; (2) Agency counsel should be required to prepare his case before the complaint is issued so that he is not responsible for any delay, and a realistic but short time deadline should be imposed on the adjudicatory schedule with deviations allowed only for demonstrated cause; (3) Private remedies through coordinate civil litigation should be available (with specific provision for attorneys fees, costs and class actions) to relieve the burden of heavy agency caseloads; (4) Interlocutory appeals should be available only when the trial examiner certifies that the question is both important and has not been previously decided, and such appeals should be decided by one commissioner rather than the full agency. Separate consideration of these proposals would be time consuming and would ignore the package potential—there probably is a critical mass in any procedural reform. Examining their impact on agencies in general would be too large a task for one or a group of part-time consultants. Therefore, as a compromise, which I find appealing, I would recommend that a series of intensive studies be made of individual agency procedures and problems, not separated from their substantive context, with an eye toward realistic alternative responses. (Although they did not give substantial attention to its adjudicative procedures, recent headlined analyses—as well as Professor Auerback's earlier study—of the FTC are illustrative.) Then, after a series of such studies—especially if patterned on the same analytic framework—the Conference should develop common responses to similar adjudicative problems. The alternative of piecemeal studies substantiates this suggestion.

APPENDIX A

Rule 56 of the Federal Rules of Civil Procedure:

SUMMARY JUDGMENT

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits are Unavailable.* Shou'd it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery and to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX B

Draft Summary Decision Rule as originally submitted to agencies and others for comment:

§ 1 A party to an adjudicatory proceeding may, at any time after commencement of the proceeding and at least 20 days before the date fixed for the adjudicatory hearing, move with or without supporting affidavits for a summary decision in his favor upon all or any part of the claim(s) or issue(s) being adjudicated.

§ 2 Any other party may, within 10 days after service of the motion, serve opposing affidavits. The presiding officer may, in his discretion, set the matter for oral argument and call for the submission of briefs. The decision sought by the moving party shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision.

§ 3 Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The presiding officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

§ 4 Should it appear from the affidavit of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

RECOMMENDATION NO. 21

DISCOVERY IN AGENCY ADJUDICATION

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing Conferences*

The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions*

A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses*

(a) *Prior Statements*

At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

(b) *Narrative Summaries of Expected Testimony*

At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under 3(a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written Interrogatories to Parties*

(a) *Availability*

A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories, should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of an answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

5. *Requests for Admissions*

(a) *Availability*

A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of Documents and Tangible Things*

(a) *From Non-Parties*

A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties*

A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*

For the purposes of paragraph 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*

(a) *Control Over Discovery*

The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory Appeals*

Except as provided by 2(6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*

(a) *Authority of Presiding Officer in General*

The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses*

The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera Proceedings*

The presiding officer should have the authority to permit a party or person seeking a protective order to make all of part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas*

The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

REPORT OF THE COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS IN SUPPORT OF RECOMMENDATION NO. 21

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INTRODUCTION

Recommendation No. 30 of the prior Administrative Conference. In 1962 the Administrative Conference of the United States approved in principle the application of discovery to adjudicatory proceedings before administrative agencies and recommended that each agency adopt rules providing for discovery "to the extent and in the manner appropriate to its proceedings." Recommendation No. 30, S. Doc. No. 24, 88th Cong., 1st Sess, 115, 117 (1963). The accompanying Report of the Committee on Compliance and Enforcement Proceedings discussed the advantages of broadened administrative discovery. That report quoted (at p. 122) Professor J. W. Moore on the benefits of pretrial discovery of all relevant, unprivileged material:

> 1. It is of great assistance in ascertaining the truth and in checking and preventing perjury * * *.
>
> 2. It is an effective means of detecting and exposing false, fraudulent, and sham claims and defenses.
>
> 3. It makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with great difficulty and sometimes not at all.
>
> 4. It educates the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements out of court.
>
> 5. It expedites the disposal of litigation, saves the time of the courts, and clears the docket of many cases by settlements and dismissals which otherwise would have to be tried.
>
> 6. It safeguards against surprise at the trial, prevents delays, and narrows and simplifies the issues to be tried, thereby expediting the trial.
>
> 7. It facilitates both the preparation and the trial of cases.
>
> 4 Moore, *Federal Practice* 26.02[2]

The Committee Report then described the discovery provisions in the Federal Rules of Civil Procedure and urged agencies to adopt for their adjudicatory proceedings as much of the federal discovery practice as was appropriate. The Report contended that the adoption of discovery would reduce delays and promote fairness without prejudicing an agency's execution of its statutory responsibilities. Furthermore, discovery would not require disclosure by an agency or private person of any material recognized as privileged by law. Report of the Committee on Compliance and Enforcement Proceedings on Recommendation No. 30, *id.*, at 138.

The response of the agencies to this recommendation has been mixed. The most positive response came in 1968, when both the Federal Communications Commission and the Federal Maritime Commission adopted discovery rules closely modeled on the Federal Rules of Civil Procedure.[1] These two agencies thus joined the Federal Trade Commission, which had enacted its own discovery rules in 1961, as the only major federal agencies whose rules authorized broad discovery in adjudicatory proceedings. The Interstate Commerce Commission may shortly join this group. The Office of the Secretary and the Association of Interstate Commerce Commission Practitioners have drafted discovery rules for consideration by the Commission. Their draft closely follows the Federal Rules and takes into account the amendments to those Rules proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in its *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery* (Nov. 1967).[2]

The present Discovery Recommendations build on the prior Recommendation No. 30. They recognize the importance of discovery in agency adjudication and develop minimum standards for its use. While Recommendation No. 30 spoke in general terms and urged agencies to make appropriate provisions for discovery, these recommendations outline as specifically as possible the type of discovery which is appropriate in adjudicatory proceedings. Recommendations 1 through 6 each cover a separate discovery tool and designate minimum standards for its use in adjudicatory proceedings. An agency remains free of course to provide for additional discovery if it finds it appropriate to do so. The preamble to the Discovery Recommendations also recognizes that there is great diversity in adjudicatory proceedings and that the detailed recommendations may not be suitable for some types of proceedings. Individual agencies may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives.

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[1] Both the FCC and the FMC published a helpful accompanying commentary with their new rules. See, for the FCC, 11 F.C.C. 2d 185, 11 R.R. 2d 1691 (1968), amended 13 F.C.C. 2d 909, 13 R.R. 2d 1671 (1968); for the FMC, 33 Fed. Reg. 14406 (Sept. 25, 1968).

[2] On March 30, 1970 the Supreme Court approved the substance of the proposed amendments. The new rules have been transmitted to Congress and are scheduled to go into effect on July 1, 1970. This report was completed prior to the Court's action. Thus, the text follows the numbering of the former rules and refers to the proposed amendments.

Summary of Discovery Recommendations. Recommendations 1, 2, 4, 5, and 6 cover respectively Prehearing Conferences, Depositions, Written Interrogatories to Parties, Requests for Admissions, and Production of Documents and Tangible Things.[3] Each of these recommendations thus adapts to administrative adjudications a particular discovery Provision of the Federal Rules of Civil Procedure. Those Rules presently provide for Pre-Trial Conferences (Rule 16), Depositions (Rule 26), Written Interrogatories (Rule 33), Production of Documents and Things (Rule 34), and Admissions (Rule 36). The Discovery Recommendations, however, do not propose that federal agencies simply adopt the federal discovery practice but contain important modifications to meet the special needs of administrative proceedings. The administrative process, for instance, must remain relatively inexpensive and speedy. These recommendations thus seek to establish a model for discovery in administrative proceedings which relies heavily on the successful experience of the judicial model but often departs from that model to preserve the distinctiveness of the administrative process.

The Federal Rules of Civil Procedure describe in considerable detail how the various discovery tools should operate. For instance, Rule 30 contains elaborate provisions on the mechanics of taking a deposition on oral examination, while Rule 33 establishes a time schedule for serving and answering written interrogations and a mechanism for handling objections. The Discovery Recommendations do not purport to treat in any comprehensive fashion these mechanical provisions regulating the discovery process. Mechanical provisions must frequently vary between agencies because each agency must structure its discovery rules to meet the peculiar nature of its proceedings. While these recommendations thus allow the individual agencies to fill in many details of discovery, they contemplate that agencies generally will follow federal law on the proper use and scope of these discovery tools where the recommendations themselves do not propose modifications. For instance, agencies should look to the Federal Rules of Civil Procedure and judicial decisions interpreting them for guidance in resolving such issues as the privileges available to litigants, the sufficiency of answers to written interrogatories, and the permissible use of depositions at the hearing itself. It was not felt necessary to refer to these matters in the text of the recommendations because the recommendations concentrate on the modifications which the administrative model for discovery must make in the judicial model.

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[3] These proposed recommendations and the others so referred to herein are incorporated in official Recommendation No. 21 as appropriate subparagraphs but with the same numerical designation.

Recommendations 3 on Witnesses differs from the other recommendations in that it derives primarily from federal criminal practice rather than from the Federal Rules of Civil Procedure. This recommendation broadens the *Jencks* rule[4] to require the prehearing disclosure by the agency of the prior statements of its witness and provides in addition for the prehearing production by all parties to the proceeding of narrative summaries of the expected testimony of their witnesses. The latter provison complements the provision in Recommendation 1 on the prehearing exchange between the parties of evidentiary exhibits and witness lists.

Recommendations 7, 8 and 9 contain general provisions essential to the effective functioning of the discovery process in adjudicatory proceedings. Recommendation 7 strengthens the position of the presiding officer by authorizing him to impose time limitations on discovery and by restricting interlocutory appeals from his rulings on discovery matters. Protective orders are provided for by Recommendation 8. While generally adopting the approach of the Federal Rules of Civil Procedure, that recommendation contains additional provisions on the protection of witnesses designed to meet the special needs of administrative adjudications. Recommendation 9 recognizes the necessity of subpoenas for the enforcement of discovery requests and reaffirms that principle that agencies which conduct adjudicatory proceedings should have the power to issue subpoenas.

The basic approach of these recommendations is to expand the availability of discovery in adjudicatory proceedings as far as is compatible with the effective dispatch of agency business. The American Bar Association's Project on Minimum Standards for Criminal Justice adopts a similar approach to discovery in criminal prosecutions. The Project's tentative report on *Standards Relating to Discovery and Procedure before Trial* (May 1969) (hereinafter cited as ABA *Standards Relating to Discovery* (Tentative Draft, May 1969)) outlines a model for discovery in criminal cases which broadly provides for discovery in areas in which it has not previously been available in either state or federal courts. The report's basic premise is stated in Standard 1.2 on the Scope of Discovery: "In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system and national security." The specific standards proposed by the ABA often vary from these Discovery Recommendations on account of the peculiarities of the criminal process, but the two models are strikingly similar in many important aspects. Both the ABA Standards and these recommendations emphasize the importance for discovery of pre-trial hearings and of pre-trial disclosure by the government of the names and prior statements of its witnesses. This latter emphasis on "witness discovery" is consistent with the major recent advances in favor of witness discovery in state criminal prosecutions. A growing number of states, most notably California and New Jersey, permit the criminal defendant to discover not only the prosecutor's witness list but also the prior statements of prosecution witnesses. Hill, Pretrial Discovery of Prosecution Witnesses in State Courts, *Criminal Defense Techniques,* (Cipes, Ed. 1970). These recommendations also assign a secondary role to depositions, while the ABA Standards do not provide for depositions at all. These resemblances are not surprising considering the analogous nature of many agency compliance and enforcement proceedings and criminal prosecutions.

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[4] The *Jencks* rule derives from *Jencks* v. *United States*, 353 U.S. 657 (1957), and 18 U.S.C. 3500 (1964) (Jencks Act).

Coverage of Discovery Recommendations. All nine recommendations are limited to adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act. The type of proceedings covered by the recommendations would include enforcement and disciplinary actions, licensing, and reparations cases. The recommendations do not extend to informal adjudications but only to adjudications already controlled by sections 5, 7 and 8 of the Administrative Procedure Act where Congress has made the determination that the agency decision should be based on a record compiled at a formal hearing. The existing formal procedure should readily adjust to the addition of discovery, while formal discovery rules of this type may often deprive more informal adjudications of the desired informality. Of course, the Discovery Recommendations state minimum requirements; and agencies which conduct adjudicatory proceedings which are exempt from the requirements of sections 5, 7 and 8 of the Administrative Procedure Act should consider whether the spirit of these recommendations extends to their proceedings as well. Often the basis for the exemption is technical or unrelated to preserving the informal nature of the proceeding. The need for adequate discovery may be just as great in these proceedings as in proceedings formally subject to sections 5, 7 and 8 of the Administrative Procedure Act. Recommendation No. 30 of the prior Administrative Conference acknowledged this fact by approving in principle discovery in *all* adjudicatory proceedings. These recommendations do not depart from that principle but construct a model for discovery that is appropriate for formal adjudicatory proceedings.

Rulemaking proceedings are also excluded from the coverage of these recommendations. Formal discovery rules have apparently never been tested in administrative rulemaking. These recommendations develop a model for discovery suitable for adjudicatory proceedings where agencies already have had some experience with discovery. Rulemaking proceedings, even those subject to sections 7 and 8 of the Administrative Procedure Act, raise different considerations which require a separate model for discovery. Rulemaking frequently involves large numbers of parties and a wide range of issues, including basic issues of national policy. These features are found much less frequently in adjudicatory proceedings and make impracticable the wholesale application of these Discovery Recommendations to rulemaking. This Report therefore does not consider the applicability of discovery to rulemaking.

Implementation of the Discovery Recommendations. The implementation of these recommendations by individual agencies normally should not require the agency to seek enabling legislation from Congress. Of course, those few remaining agencies which do not possess the subpoena power must obtain it from Congress if there are to be any effective sanctions behind their discovery rules. Recommendation 9 on subpoenas recognizes this problem, which is discussed further in the section of this Report on that recommendation. Agencies that do have the power to issue subpoenas must simply determine whether they have statutory authority to adopt procedural rules on discovery. Normally, the delegation by Congress to the agency of general rulemaking power or of power to conduct its own proceedings in the public interest should suffice to authorize the agency to adopt such procedural rules. *FCC* v. *Schreiber*, 381 U.S. 279 (1965). In *Schreiber*, the Supreme Court upheld the FCC's rule on the public disclosure by the agency of information acquired by it during an investigation on the ground that Congress had left largely to the agency's judgment the determination of the manner of conducting its proceedings which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice. Section 4(j) of the Communications Act of 1934, which empowered the FCC to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice," delegated to the FCC power to resolve "subordinate question of procedure." *FCC* v. *Schreiber*, *id.* at 289. Most agencies have comparable grants of authority and should be able to enact discovery rules on their own initiative.

A potential obstacle to this agency initiative is the Ninth Circuit's ruling in *FMC* v. *Anglo-Canadian Shipping Co.*, 335 F.2d 255 (1964), that Congress did not authorize the FMC to adopt a discovery rule for the production of documents when it conferred general rulemaking power on the Commission. That decision has been sharply criticized and has not inspired any progeny. Galland, A Note on Maritime Discovery, 19 *Ad. L. Rev.* 119 (1966). The opinions in the case, particularly the concurring opinion of Judge Pope, reflected a negative attitude toward the desirability of discovery in administrative proceedings which influenced the judges in their determination that the FMC had exceeded its statutory authority. In dictum, the opinion for the court acknowledged that Congress had delegated discovery powers to at least three other agencies (ICC, CAB, and FPC). Following this decision the FMC obtained from Congress legislation authorizing it to adopt discovery rules similar to those in the Federal Rules of Civil Procedure. Public Law 90–177, now 46 U.S.C. 826. The *Anglo-Canadian* decision, however, did not deter the FCC from adopting in 1968 liberal discovery rules without first obtaining specific Congressional approval and has not affected the operation of the FTC's discovery rules, which also do not have explicit Congressional sanction. The decision's impact has therefore been slight; and its prece~~n~~dential authority has been undermined by the more recent Supreme Court decision in *FCC* v. *Schreiber*, supra.

Meaning of the Term "Party." The term "party" is used in these recommendations in accordance with the definition of party in section 2(b) of the Administrative Procedure Act, 5 U.S.C. 551(3) and is intended to cover the agency whenever the agency through its bureaus or employees participates in the proceeding as a party. The Administrative Procedure Act defines party to include "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes." Under this definition the agency is not a party to a proceeding simply because it provides a forum to adjudicate a controversy between private parties. For instance, in some comparative licensing applications at the FCC the agency staff does not participate as a party. However, it is more customary for the agency staff in such private disputes to intervene as a party to represent the public interest. This is the normal role of the Office of Hearing Counsel at the FMC and of Public Counsel at the Federal Maritime Administration. The agency thus becomes a party to those proceedings. Recommendation 6(c) also contains a special provision which for purposes of Recommendation 6 treats the agency as a party to the proceeding even though the agency does no more than provide the forum for adjudicating a controversy.

DISCOVERY RECOMMENDATION 1. PREHEARING CONFERENCES

"The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, for good cause shown, their evidentiary exhibits and witness lists."

The Prehearing Conference in Agency Adjudication. Prehearing conferences have become commonplace in agency adjudication. Most agencies have recognized them as effective devices for encouraging the settlement of cases and for shortening the time necessary for the hearing. Settlement talk quite naturally follows from bringing the parties together at the conference to exchange information and to discuss the case. When settlement is not possible, the latter goal of shortening the hearing can still be accomplished if the presiding officer and the parties work together to simplify the issues and to obtain stipulations of facts and of the genuineness of documents. Recommendation 1 does not list these and other possible functions of the prehearing conference but concentrates on the value of the prehearing conference as a means of providing the parties with discovery.

Agency rules authorizing the holding of prehearing conferences are generally modeled on Rule 16 on Pre-Trial Procedure of the Federal Rules of Civil Procedure. A typical provision is § 1852.3–1 of the rules of practice of the Bureau of Land Management, Department of the Interior, for hearing procedures in contest proceedings affecting government lands:

> *Prehearing Conferences*
>
> (a) The Examiner may in his discretion, on his own motion or on motion of one of the parties, or of the Bureau, direct the parties or their representatives to appear at a specified time and place for a prehearing conference to consider: (1) The simplification of the issues, (2) the necessity of amendments to the pleadings, (3) the possibility of obtaining stipulations, admissions of facts and agreements to the introduction of documents, (4) the limitation of the number of expert witnesses, and (5) such other matters as may aid in the disposition of the proceedings.
>
> (b) The Examiner shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements. Such order shall control the subsequent course of the proceedings before the Examiner unless modified for good cause, by subsequent order.
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> 43 C.F.R. 1852.3–1 (1969)

This rule strengthens the presiding officer's position by providing that he may "direct" the parties to attend a prehearing conference and may enter a binding prehearing order. The Department of Agriculture's rule on prehearing conferences in disciplinary and reparations proceedings under the Packers and Stockyards Act and Perishable Agricultural Commodities Act is quite similar:

> *Prehearing Conferences*
>
> In any proceeding in which it appears that such procedure will expedite the proceeding, the examiner, at any time prior to or during the course of the oral hearing, may request the parties or their counsel to appear at a conference before him to consider (a) the simplification of

> issues; (b) the necessity or desirability of amendments to the pleadings; (c) the possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof; (d) the limitation of the number of expert or other witnesses; or (e) such other matters as may expedite and aid in the disposition of the proceeding. No transcript of such conference shall be made, but the examiner shall prepare and file for the record a written summary of the action agreed upon or taken at the conference, which shall incorporate any written stipulations or agreements made by the parties at the conference or as a result of the conference. If the circumstances are such that a conference is impracticable, the examiner may request the parties to correspond with him for the purpose of accomplishing any of the objects set forth in this section. The examiner shall forward copies of letters and documents to the parties as the circumstances require. Correspondence in such negotiations shall not be a part of the record, but the examiner shall submit a written summary for the record if any agreement is reached or action is taken.
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> 9 C.F.R. 202.15 (1969),
> 9 C.F.R. 202.47 (1969),
> 7 C.F.R. 47.36 (1969),
> 7 C.F.R. 47.15 (1969).
> (identical texts)

Under this rule, however, the presiding officer may only "request" the parties to attend the conference and enter a "written summary" of any action taken.

Rule 16 of the Federal Rules of Civil Procedure makes the pre-trial conference optional with the district court or presiding judge. Agency rules authorizing the holding of prehearing conferences must also necessarily leave their scheduling and structure greatly to the discretion of the presiding officer because of the great variety of cases handled by a given agency. Certain complex cases may require a series of prehearing conferences, some of them quite informal and off the record. On the other hand, many cases do not justify the trouble and expense of bringing the parties together at the prehearing stage. For instance, many proceedings brought by the Coast Guard (Department of Transportation) to revoke or suspend a seaman's license involve such simple issues as whether the seaman was drunk or had narcotics in his possession. Prehearing conferences may not be necessary in all such cases. Practical considerations may also make the holding of a prehearing conference inappropriate in some cases. The parties or their attorneys may find it too burdensome to attend both a prehearing conference and the hearing itself.

While Recommendation 1 therefore leaves the holding of prehearing conferences to the discretion of the presiding officer in all cases, it does provide some general guidelines on the types of cases where prehearing conferences are desirable. Under these guidelines, the presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. § 3.21(a) of the FTC's Rules of Practice for Adjudicative Proceedings presently contains a more restrictive provision requiring the presiding officer to hold a prehearing conference "upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days." 16 C.F.R. 3.21(a) (1969). The Judicial Conference of the United States, particularly its Committee on Pre-Trial Procedures, has also recognized the need for imposing firmer limits on the trial judge's discretion on holding pre-trial conferences. 3 Moore, *Federal Practice* par. 16.06 (2d ed. 1968). Individual agencies may also determine that prehearing conferences should be mandatory in particular situations. Recommendation 1 does not preclude the development of this practice because it only establishes minimum standards for discovery; but it recognizes that as a general matter it is unwise for agency rules to force a presiding officer to hold a prehearing conference which he believes is unnecessary simply because one party requests it or because the hearing is likely to last a given number of days. An unnecessary prehearing conference is burdensome to parties and their attorneys who must often travel long distances to attend.

The Prehearing Conference as a Discovery Device. The rules of practice of the Agriculture and Interior Departments quoted above enumerate the traditional functions of the prehearing conference. In addition to performing these traditional functions, the prehearing conference is developing at a number of agencies into an effective discovery device. The prehearing conference becomes a discovery device when the presiding officer requires the parties to exchange prior to the hearing their evidentiary exhibits and witness lists. Such arrangements can properly be characterized as discovery because each party to the proceeding becomes more aware of his opponent's case and can thus better prepare for the hearing without fear of surprise. This development is one of the more striking recent advances in administrative procedure and for once places the agencies ahead of the courts in allowing discovery.

The use of the prehearing conference as a discovery device is commonplace at the FTC, SEC, FMC, FCC, Department of Agriculture, Department of Labor, and CAB. The FTC rule on prehearing conferences, § 3.21(a) of the Rules of Practice for Adjudicative Proceedings, 16 C.F.R. 3.21(a) (1969), provides that at the prehearing conference the examiner should have the parties consider: "(6) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding." The functioning of this rule is particularly important in complex merger cases, where complaint counsel plans to introduce into evidence reports on market shares (or statistical summaries of these reports) obtained from the respondent's competitors. Since a complaint in a merger case is framed in very general terms, the respondent may first learn the basis for the government's case against him when he obtains these reports at the prehearing stage.

Rule 8(d) of the SEC Rules of Practice also specifically provides that the presiding officer at the prehearing conference shall consider ordering the parties to "exchange copies of proposed exhibits." 17 C.F.R. 201.8(d) (1969). Such exchanges are commonplace in disciplinary proceedings against broker-dealers, and the Division of Trading and Markets is also willing to exchange witness lists except in cases where it is convinced that it must keep the identity of its witnesses secret in order to protect them. Likewise, the FMC's Rule 6(d) on prehearing conferences specifies that "[t]he presiding officer may require, prior to the hearing, exchange of exhibits and any other material which may expedite the hearing." 46 C.F.R. 502.94(a)(2) (1969). Exchanges of witness lists frequently occur under this rule. The hearing examiners at the FMC have developed in addition a procedure whereby the parties to complaint and investigation proceedings circulate prior to the prehearing conference requests directed to each other for factual information or for the production of documents. At the prehearing conference the examiner rules on these requests. The exchange of information and documents which follows affords the parties significant discovery, which includes (but is not limited to) the evidentiary cases of their adversaries. This procedure has worked particularly well in complex, multiparty investigation proceedings where the FMC has ordered a hearing to determine the legality of the practices of individual carriers or conferences of carriers.

The FCC rule on prehearing conferences (Rule 1.248, 47 C.F.R. 1.248 (1969)) differs in form from the FTC, FMC, and SEC rules. While the FCC rule does refer to the prehearing conference as a place to consider limitations on the number of witnesses and the reduction of a party's case to written form, it does not specifically mention any exchange of exhibits or witness lists between the parties. The hearing examiners have nevertheless used this rule quite effectively in comparative hearings to require the competing applicants for a license to exchange (and thus "freeze") their entire affirmative cases at the prehearing stage. FCC examiners have also directed parties in comparative hearings to produce documents which the examiners believed should be part of the case. Hearing examiners in the Department of Agriculture have also required parties in disciplinary and reparations proceedings to exchange exhibits at the prehearing conference although the applicable rule on prehearing conferences (quoted above at pp. 9–10) makes no mention of this procedure.

The Department of Labor's rule on prehearing conferences in contract debarment cases under the Walsh Healy Act authorizes the consideration at the prehearing conference of "the propriety of mutual exchange among parties of prepared testimony or exhibits." 41 C.F.R. 50–203.7 (1969). The Department follows the practice of charging in quite general terms that a contractor has underpaid his employees and then furnishing particulars at the prehearing conference. Normally this is done by supplying the contractor with the individual forms filled out by the Wages and Hours Inspector for each underpaid employee and the composite form listing all the contractor's underpaid employees. These forms contain all the relevant information about the underpaid employees and show the inspector's computations on how much more each employee should have been paid than he was in fact paid. These forms are then admitted into evidence at the hearing as part of the Department's case against the contractor. The Department's Rules of Practice for enforcement proceedings under the new Service Contract Act (see 29 C.F.R. 6.7 (1969)) do not mention any exchange of exhibits at the prehearing conference, but the examiners, who also hear Walsh Healy Act cases, have followed the same practice in the growing number of wages and hours cases arising under the Service Contract Act.

Finally, the most striking use of the prehearing conference as a discovery device occurs at the CAB. Rule 23 of the CAB's Rules of Practice, 14 C.F.R. 302.23 (1969), states in part that the purpose of the prehearing conference is "to define and simplify the issues and the scope of the proceeding, to secure statements of the positions of the parties with respect thereto . . . [and] to schedule the exchange of exhibits before the date set for hearing." In addition, the rule authorizes the examiner to compel by subpoena a party to produce at the conference documents requested by another party and to direct a party to prepare and submit further exhibits. The operation of this rule alone is sufficient to insure adequate discovery before the CAB. See Maurer, Use of Discovery Procedures before the CAB, 18 *Ad. L. Rev.* 157 (1966).

At three agencies, the Coast Guard, the INS[5] and the NLRB, have inadequate provisions in their rules of practice for prehearing conferences. Both the Coast Guard and, to a lesser extent, the INS have successfully experimented with the holding of prehearing conferences despite the absence of any specific authorization for them in their rules. Prehearing conferences may even have become routine in suspension and revocation proceedings conducted by the Coast Guard in connection with seamen's and other certificates. The INS's general view still seems to be that prehearing conferences (and discovery in general) are unnecessary and inappropriate in its proceedings because the order to show cause which initiates the proceeding states in detail the factual basis of the Service's case and because the hearing is ordinarily scheduled not less than seven days after the service of the order to show cause. Practitioners interviewed in the preparation of this Report asserted, however, that the lack of any meaningful discovery in deportation and related proceedings is a serious defect in the Service's procedures. While the absence of discovery does not disadvantage the respondent in the routine case where he admits the allegations in the order to show cause and simply seeks some form of discretionary relief, it does hurt the respondent in cases where he contests the basis for the deportation or other action. In these cases the alien and his counsel must often go into the hearing without any knowledge of the witnesses or documentary evidence which the Service plans to introduce into evidence against him. In cases involving alien seamen who overstay their shore leave, the Service obtains the seaman's book from the shipping company for which he worked but may not make it available to the seaman himself until the hearing opens. This lack of a prehearing conference or any other discovery often leads to delays, because the respondent must seek a continuance of the hearing once he learns the Service's case or must determine as best he can at the hearing itself what subpoenas or evidence he needs to meet that case. The NLRB also relies on the complaint (and, in appropriate cases, on a bill of particulars) to notify the respondent in an unfair labor practice proceeding of the agency's case and only rarely holds a prehearing conference. The NLRB rules only authorize the examiner to "hold conferences for the settlement or simplification of the issues by consent of the parties." 29 C.F.R. 102.35(g) (1969). Once again there is considerable sentiment among practitioners for the institution of prehearing conferences to enable them to better prepare for the hearing. See ABA Section of Labor Law, Committee on Practice and Procedure, *Report of Subcommittee on Discovery and Pre-Trial* (1969).

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[5] These Discovery Recommendations technically do not apply to the INS because its adjudicatory proceedings are exempted by statute from sections 5, 7 and 8 of the Administrative Procedure Act. *Marcello* v. *Bonds*, 349 U.S. 302 (1955). However, the spirit of the recommendations certainly does extend to deportation and analogous proceedings conducted by the INS. See the discussion in the Introduction on the coverage of these recommendations.

Effect of Discovery Recommendation. 1. Recommendation 1 builds on the experience of those agencies that have recognized the effectiveness of the prehearing conference as a means for furnishing the parties with discovery. The recommendation should have the dual effect of spurring other agencies to adopt comparable prehearing procedures and of strengthening those procedures at agencies which have already developed them. Those few remaining agencies whose rules of practice do not adequately provide for prehearing conferences should amend their rules to authorize the presiding officer to hold one or more prehearing conferences. The second, more important effect of the recommendation should be to strengthen the prehearing conference as a discovery device at agencies whose rules already authorize the holding of prehearing conferences. Some agencies have experienced difficulty with prehearing procedure when one or more parties to the proceeding refuse to cooperate in the exchange of exhibits and information. Often respondents feel that discovery is a one-way street and that they need not disclose their case to the agency prior to the hearing. The solution to this problem is to upgrade the role of the presiding officer. Under Recommendation 1, he has the power, which he does not possess under the existing rules of many agencies, both to call a prehearing conference and to direct at the conference that the parties exchange their evidentiary exhibits and witness lists prior to the hearing. This recommendation thus contemplates that the presiding officer will assume the role of "governor of the law suit" and not simply play "umpire." [6]

While Judge Murrah coined these phrases with federal district judges in mind, they are equally applicable to presiding officers in administrative adjudications. The effective conduct of an agency hearing is dependent on the presiding officer's diligence and on his ability to control the proceeding. James M. Nicholson, *Discovery is not a Game* 7 (Speech before the Council on Antitrust and Trade Regulation of the Federal Bar Association, September 11, 1968, reprinted in 21 *Ad. L. Rev.* 441–446 (1969). The FTC has repeatedly stressed that at the prehearing conference the examiner should not leave the identification of the issues to the parties but should take "affirmative action" himself to clarify and simplify the issues. *Topps Chewing Gum, Inc.*, [1963–1965 Transfer Binder] Trade Reg. Rep. par. 16,471, at 21,342 (FTC 1963). Likewise, the examiner should not just leave the exchange of exhibits and witness lists for the parties to work out themselves but should take affirmative action to make sure they do so. Sound judgment and considerable skill on his part will be necessary to insure the smooth and expeditious exchange of cases between the parties. In complex cases, for instance, the parties may not be willing to commit themselves to particular exhibits or witnesses until the issues have been determined and until they have some indication of their opponent's case. An able examiner can overcome this difficulty by holding a series of prehearing conferences where the parties first make very tentative exchanges and statements of the issues and subsequently add to their exhibits and finalize them. In cases where a party is in doubt on whether he plans to use a particular exhibit at the hearing, the examiner should encourage or order him to exchange it with the other parties since a party is free at the hearing stage not to rely on the exchanged exhibit. In the meantime, the other parties have received the benefit of some discovery.

Exchange of Evidentiary Exhibits and Witness Lists. Recommendation 1 leaves the scheduling of the exchange of evidentiary exhibits and witness lists to the discretion of the presiding officer. In the great majority of cases the exchange should not take place at the initial prehearing conference because it is not realistic to expect the parties at that early stage to disclose their cases. Furthermore, in enforcement and disciplinary proceedings the agency should normally produce its exhibits and witness list first because it is not fair to expect the respondent to commit himself on his own case before he knows the agency's case against him. These procedures have not been specified in the text of the recommendation because it is important that the presiding officer retain flexibility in scheduling the exchange. The presiding officer may find it appropriate in a particular proceeding or class of proceedings where the issues are straightforward to require a simultaneous exchange or an exchange at the close of the first (and only) prehearing conference. For instance, the simultaneous exchange of evidentiary exhibits is customary in CAB route proceedings.

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[6] Judge Alfred P. Murrah, Seminar of Procedures Prior to Trial, Ninth Circuit Judicial Conference 1957, 20 F.R.D. 485, 491.

The one limitation in Recommendation 1 on the presiding officer's discretion in scheduling the exchange of exhibits and witness lists is that the exchange should be completed "prior to the hearing." Discovery in general should be completed prior to the hearing and not continued at intervals during the hearing itself. Deferral of discovery in this fashion generally disrupts and prolongs the conduct of the hearing. There may be particular types of proceedings, however, where an agency determines that the respondent's disclosure of his witness lists and exhibits may properly be deferred until after an agency presents its affirmative case. This deferred disclosure should be reserved for exceptional cases, but it may in some instances serve to expedite matters by making it easier for the respondent to comply. Recommendation 1 does not preclude an agency from authorizing its presiding officers to adopt such a special procedure in proceedings where it is appropriate and where it accomplishes the basic discovery objectives of the recommendation. The objectives are satisfied when the agency affords the respondent full discovery prior to the hearing and where the agency's broad investigatory powers and the nature of the issues in the case combine to make it unnecessary for the agency to know the identity of the respondent's witnesses and exhibits before it presents its own affirmative case.

Recommendation 1 specifically permits a party where good cause exists to amend at any time, by deletion or supplementation, his evidentiary exhibits and witness lists. A party may uncover additional exhibits or witnesses prior to the hearing whose existence or relevance were understandably not known to him at the time of the exchange. Respondent's counsel, for instance, may not realize the need for additional exhibits or witnesses until after the agency presents its case at the hearing. Agency counsel also cannot be expected to fully know what rebuttal evidence is necessary until he has heard the respondent's case at the hearing. For these reasons amendments to evidentiary exhibits and witness lists should be allowed for good cause at any time. Good cause is required because the parties should be expected to prepare their cases as fully as possible at the prehearing stage and to commit themselves at that time on the issues and on their factual contentions. Implicit in the concept of good cause is that a party must amend his exhibits and witness lists as soon as he has cause to do so. If a party learns of the existence of a new witness or document prior to the hearing, he should amend his list at that time rather than await the commencement of the hearing. A party who has good cause must act promptly and not seek to surprise the other parties at the hearing with the new matter.

The "evidentiary exhibits" which the parties must exchange at the prehearing stage under this recommendation include documents and other matter of which a party wants the presiding officer to take official notice. This approach conforms with section 7(e) of the Administrative Procedure Act, 5 U.S.C. 556 (e), which grants a party the opportunity to show the contrary when an agency takes official notice of a material fact. For that opportunity to be a meaningful one, it should be offered to the party as early as possible in the proceeding. See Davis, *Administrative Law,* par. 15.10 (1958). A party should therefore know at the prehearing stage whether his opponent's case depends on official notice so that he can challenge at the hearing the use of that doctrine.

Witness Lists. The exchange of witness lists at the prehearing stage of the proceeding does raise special problems. Such an exchange is desirable and furthers the purposes behind discovery because it contributes to the fund of information which each party develops on the case. Direct benefits from the exchange include the avoidance of surprise witnesses at the hearing and of unnecessary trial preparation to meet the testimoney of witnesses who will not be called. There is a danger, however, that other parties will attempt to intimidate a prospective witness or to influence his testimony. This danger is particularly apparent in an enforcement proceeding in which the agency plans to call witnesses who are employees of the respondent or who are otherwise dependent upon him. On account of this danger, many agencies are chary about prehearing disclosure of witness lists. Among agencies with adjudicatory responsibilities, only the FTC routinely discloses its witness list proir to the hearing. The General Counsel's Office of the NLRB is willing at the prehearing stage of an unfair labor practice case to make available to the respondent any documents it plans to introduce into evidence but uniformly refuses to disclose the name of its witnesses. While the SEC's Division of Trading and Markets often does disclose its witness list prior to the hearing in disciplinary proceedings, the SEC has ruled that the respondent is not entitled to this as a matter of right. *Keystone State Investment Securities, Inc.*, Securities Exchange Act Release No. 8662, p. 12 (Aug. 6, 1969). The Commission's position has recently been upheld in court. *Armstrong, Jones & Co.* v. *SEC*, 6th Cir., Jan. 22, 1970.

The dangers posed to prospective witnesses by the prehearing disclosure of witness lists should not be exaggerated. The limited experience to date with this type of discovery in criminal and enforcement proceedings should encourage agencies to provide for the prehearing exchange of witness lists. A surprising number of states (approximately twenty-two in number) already require by statute or by rule that the accused in a criminal prosecution be notified prior to trial of the witnesses to be called by the prosecution, usually by endorsement of their names on the indictment or information. ABA *Standards Relating to Discovery* 56–57 (Tentative Draft, May 1969). The ABA study found that the fear that the defendant would tamper with or intimidate the witnesses against him if he knew their names prior to trial was justified in only a minority of cases and should be dealt with by protective orders in particular cases rather than serve as a barrier to discovery in all cases. *Id.* at 2–3. The Department of Labor, which enforces the Fair Labor Standards Act through civil actions in the federal district courts, also complies with local court rules on the exchange of witness lists. The Department's position, which has been upheld in the courts, is that it will not disclose the names of its witnesses as part of the initial discovery process but that it will disclose their names at a prehearing conference or at some other date close to the trial. *Wirtz* v. *Continental Finance and Loan Co. of West End*, 326 F. 2d 561 (5th Cir. 1964); *Wirtz* v. *Hooper-Holmes Bureau, Inc.*, 327 F. 2d 937 (5th Cir. 1964). The Department of Labor in these cases deals with employee witnesses subject to the same pressures as employee witnesses in NLRB proceedings.

The disclosure of the witnesses' names may in some instances actually protect them in the same way that the disclosure of the name of the charging party in an unfair labor practice case before the NLRB protects that party. The National Labor Relations Act makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he has filed charges under the Act. 29 U.S.C. § 158(a)(4). No doubt there are many subtle forms of discrimination which the charging party may have difficulty proving. The Board may also have difficulty in fashioning effective remedies to prevent subtle forms of discrimination. Despite these difficulties, the respondent employer or union realizes that his treatment of the charging party will be closely scrutinized to insure that he does not discriminate against him for filing the charge. The respondent's awareness of this scrutiny deters him from seeking reprisals against the charging party. The disclosure of the charging party's name thus works on balance to protect him from reprisals. Likewise, the Board should be able to protect its witness and prospective witnesses. The statute also makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he has "given testimony" in an NLRB proceeding. 29 U.S.C. § 158(a)(4). While there has not yet been any occasion to test this point, the designation of an employee on a witness list should constitute "giving testimony" by the employee. Courts have already ruled that the giving of an affidavit in the course of a Board proceeding is equivalent to giving testimony. *NLRB* v. *Southland Paint Company,* 394 F.2d 717, 721 (5th Cir. 1968). Furthermore, the Congressional intent behind 8(a)(4) was to prevent the Board's channels of information from being dried up by the intimidation of complainants and witnesses. To implement this intent the Board has broad powers to prevent all forms of discrimination that affect its investigatory processes. *John Hancock Mut. Life Ins. Co.* v. *NLRB,* 191 F.2d 483 (D.C. Cir. 1951).

Witnesses in proceedings before most other agencies are not nearly as vulnerable to reprisals or intimidation as employee witnesses in unfair labor practice and wages and hours cases. Consequently, any danger to the witnesses flowing from the disclosure of the parties' witness lists is likely to be present only in a minority of cases. Protective orders are available under Recommendation 8(b) in those cases where the agency or other party to the proceeding establishes that there is a real danger that someone will seek to intimidate, harass or otherwise improperly influence the testimony of a witness once his name is disclosed. That recommendation authorizes the presiding officer, upon a showing of good cause, to restrict or defer the disclosure of a witness' name or to take other appropriate measures to protect a witness. The party seeking this exemption from disclosure must produce substantial evidence, and not just unverifiable fears, that disclosure would endanger the witness. Similar procedures have developed in California where the prosecutor in criminal cases must normally disclose the names of his witnesses prior to trial. In *People* v. *Lopez*, 60 Cal. 2d 223, 384 P. 2d 16 (1963), the Supreme Court of California held that the prosecutor properly refused to disclose the names prior to trial of two key witnesses for the State when two police officers had testified at an open hearing on the violent disposition of the defendant and the genuine fears of the witnesses. The Supreme Court of California affirmed the trial judge's order deferring the disclosure of the witnesses' names to twenty-four hours prior to the time they were to take the stand. Surely federal agencies can develop under Recommendation 8 similar procedures to handle those few cases where there is good cause for protecting a witness by keeping his identity secret.

Even in cases where the agency staff does not obtain a protective order, the identity of sensitive agency witnesses need not be disclosed prematurely. Recommendation 1 presupposes that the presiding officer will only require disclosure at some reasonable time prior to the hearing. Thus, the agency staff retains considerable flexibility on the timing of disclosure and can protect a prospective witness from needless exposure by delaying disclosure until after settlement negotiations have failed and until it is clear that the witness' testimony will be necessary at the hearing. Such procedures may be appropriate in some types of proceeding to insure that a person in a vulnerable position will not be placed on a witness list unless there is some certainty that he will be called to testify at the hearing.

The provision in Recommendation 1 on the exchange of witness lists goes further than the general discovery practice under the Federal Rules of Civil Procedure. The weight of reported authority holds that a party in a civil case need not disclose in interrogatories or on deposition the names of his trial witnesses. 4 Moore, *Federal Practice*, par. 26.19[4] (2d ed. 1969). Furthermore, Federal Rule 16 on Pre-Trial Procedure does not expressly authorize an exchange of witness lists at a pretrial conference. That rule simply enumerates five non-discovery functions of the pre-trial conference and then adds that the trial judge and the parties should consider "(6) such other matters as may aid in the disposition of the action." However, under this last provision a good number of federal district courts require parties to disclose the names of their witnesses at pre-trial. Professor Moore supports this practice and finds it consonant with modern notions of discovery. "The sporting theory of litigation thrives on surprise—including surprise witnesses. Elimination of this sort of tactic is a legitimate purpose of the discovery rules, especially when considered in connection with Rule 16 on pre-trial proceedings." 4 Moore, *Federal Practice,* par. 26.19[4] at 1252 (2d ed. 1969). While Professor Moore is discussing the exchange of witness lists in civil trials, his comments are equally applicable to administrative adjudications. The major thrust of these Discovery Recommendations is to build the prehearing conference into a significant discovery device for the exchange of information and thus to reduce the need for more expensive and dilatory means of discovery.

Discovery Recommendation 1 and Section 7 (c) of the Administrative Procedure Act. Recommendation 1 allows the presiding officer to take the initiative in holding prehearing conferences and in directing the parties to exchange evidentiary exhibits and witness lists. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(c), on the other hand, provides that "[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may . . . (6) hold conferences for the settlement or simplification of the issues *by consent of the parties*" (emphasis added). There is no reason, however, why individual agencies cannot grant additional powers to presiding officers than those enumerated in section 7(c). The purpose of that provision is to enhance the status and role of presiding officers by automatically vesting in them the enumerated powers to the extent that such powers have been given to the agency itself. *Attorney General's Manual on the Administrative Procedure Act* (1947) 74. The agency remains free to vest its presiding officers with additional powers that are within the powers delegated to the agency by Congress. "The enumeration of the powers of hearing officers is not intended to be exclusive." Statement of Attorney General Tom C. Clark on Section 7(b) (now renumbered 7(c)), printed as Appendix B to the Senate Report on the Administrative Procedure Act, 79th Congress, 1st Sess., S. Rep. No. 752 (1945). Many agencies have already granted their presiding officers greater powers with respect to prehearing conferences than those automatically granted them by section 7(c) of the Administrative Procedure Act. Both the FTC and the FCC, for example, provide in their rules that the presiding officer may call a prehearing conference on his own initiative. See § 3.21(a) of the FTC's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. 3.21(a) (1969); Rule 1.248(a) of the

FCC, 47 C.F.R. 1.248(a) (1969). The provision in the FTC rule which authorizes the presiding officer to enter a binding prehearing order at the prehearing conference was approved by the court in *Pacific Molasses Co.* v. *FTC*, 356 F. 2d 386 (5th Cir. 1966). That decision recognized that the rule in question was generous beyond the statutory requirements that bound the FTC.

DISCOVERY RECOMMENDATION 2. DEPOSITIONS

"A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing confrence;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so:

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

"An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum."

Depositions in Agency Adjudication. Depositions, particularly those taken on oral examination, have proved to be the most useful and most widely used of the discovery tools in the Federal Rules of Civil Procedure. They are also the most expensive and slowest. Depositions are nevertheless vital in court cases whose outcome may turn on a witness' remembrance or perception of past events. So far they have been little used in agency adjudication. While the great majority of agencies do have rules providing for the taking of depositions, these rules generally do not authorize discovery depositions but provide only for depositions to preserve the testimony of a witness who is near death, about to leave the country, or for some other reason unlikely to testify at the hearing.

Under the influence of the Federal Rules of Civil Procedure, the rules of a growing number of agencies now specifically permit depositions for discovery purposes. Agency rules authorizing discovery depositions in adjudicatory proceedings include Rule 3.33 of the FTC, 16 C.F.R. 3.33 (1969); Rules 1.315 and 1.316 of the FCC, 47 C.F.R. 1.315 and 1.316 (1969); Rule 12 of the FMC, 46 C.F.R. 502.201 to 502.205 (1969); Rule 1850.0–7 of the Bureau of Land Management of the Department of the Interior, 43 C.F.R. 1850.0–7 (1969)[7]; and Rule 13.53 of the FAA, 14 C.F.R. 13.53 (1969).

The oldest of these rules is that of the FTC, which was first enacted in 1961 as part of that agency's new discovery rules for adjudicatory proceedings. The operation of this rule has caused significant delays in FTC proceedings as respondents have sought to depose dozens if not hundreds of third persons on matters which the deponents often insisted deserved confidential treatment. Examiners' rulings granting or denying applications for depositions have prompted many interlocutory appeals. See e.g. *Associated Merchandising Corp.*, 3 Trade Reg. Rep. Par. 18,102 at 20,547 (FTC 1967).

Similar problems have not arisen under the FCC's deposition rules, which took effect on February 1, 1968, as part of the Commission's new discovery rules. Those rules generally apply whenever the FCC schedules a hearing to determine whether an application for an initial license or for the renewal of a license should be approved or whether an existing license should be revoked or suspended. Quite often the former type of hearing is a comparative hearing with several applicants seeking a single license and the Commission deciding on the record which applicant is the most qualified. While parties to FCC proceedings have taken advantage of the new deposition and discovery rules during the two years they have been in operation, most practitioners believe that the effectiveness of these rules has not yet been adequately tested. A number of practitioners interviewed in the preparation of this Report were apprehensive that if the FCC continues to put license renewal applications down for comparative hearings there will be serious delays in the proceedings when the renewal applicants and the protestants use the new discovery rules against each other. The party who stands to benefit from delay will be tempted to take an excessive number of depositions.

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[7] The Department of the Interior, under pressure from the House Committee on Government Operations, has recently moved to revoke this regulation on the grounds that the Department lacks statutory authority to issue subpoenas for discovery depositions or other discovery purposes. The statute granting the subpoena power to the Department (32 Stat. 790; 43 U.S.C. §§ 102–106) authorizes the issuance of subpoenas only for the attendance of witnesses and specifies that such attendance can be compelled in the case of an actual hearing only when the witness is served within the county where the hearing is held and that when the witness resides outside of that county he can be required to give a deposition in his own county for use as evidence at the hearing. Such a specific, narrow grant of the subpoena power is unusual. On this issue see *Unauthorized Bureau of Land Management Subpoena Regulations*, Twentieth Report by the House Committee on Government Operations, March 18, 1970.

The FMC's limited experience with its new deposition rule has been quite favorable. The rule applies to complaint proceedings brought by private parties to contest the legality of the practices of individual carriers or conferences of carriers and to investigation proceedings initiated by order of the Commission for the same purpose. The taking of depositions appears to be on the increase in these proceedings. While depositions may have caused some delay at the prehearing stage, they have served in many instances to expedite the hearing itself. The parties have often agreed to introduce the testimony of the deponent in written form and then to have the deponent available for cross-examination if that proves necessary. This procedure avoids repeating testimony in cases where the deponent is also a witness at the hearing.

The two remaining agencies whose rules provide for discovery depositions have had no significant experience with their operation. The Bureau of Land Management's rule, which applies to the adjudication of contests over rights in public lands between the government and a private party or between two or more private parties, has been in effect only since late 1968. While the FAA rule has a longer history, the FAA certificate proceedings to which it applies are atypical because an airman or carrier whose certificate has been suspended or revoked by the FAA has the right to a de novo hearing before an examiner of the National Safety Transportation Board in the Department of Transportation. 14 C.F.R., 421.21–.50 (1969). The certificate holder who is contesting the disciplinary action has no real need to take depositions; he can simply use the FAA hearing itself as a device to discover the agency's case against him and then seek a repeat performance before the National Safety Transportation Board.[8]

Discovery Recommendation 2. Recommendation 2 provides for discovery depositions in agency adjudications. Depositions may be taken upon oral examination or written questions for purposes of discovering relevant, unprivileged information. A recalcitrant deponent may be compelled to testify through the issuance by the agency of a subpoena ad testificandum. Rule 26(a) of the Federal Rules of Civil Procedure likewise authorizes the taking of depositions for the purpose of discovery upon oral examination or "written interrogatories." Recommendation 2 substitutes the phrase "written questions" for the phrase "written interrogatories" because of the confusing similarity between the latter phrase and the written interrogatories to parties provided for in Recommendation 4. This change in terminology conforms with the proposed amendments to the Federal Rules. Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery* 53 (Nov. 1967).

By placing six major conditions on the taking of depositions, this recommendation takes into account the newness of depositions to administrative adjudications and the dangers that their overuse will result in serious delays. These conditions reflect the basic assumption that in many adjudicatory proceedings the parties can obtain adequate discovery through the prehearing conference and through orders for the production of documents without any need for taking depositions. The taking of depositions in these instances will only make the administrative process slower and more expensive than it already is. A practitioner before the CAB has concluded that depositions for purposes of discovery are rarely necessary in CAB proceedings because the CAB has wisely implemented other discovery techniques, such as the prehearing conference and ready access to agency files. Maurer, Use of Discovery Procedures before the CAB, 18 *Ad. L. Rev.* 157 (1966). CAB proceedings, however, primarily involve applications for new or amended route operating authority where the taking of depositions would be superfluous. The facts are rarely in dispute and much of the witness testimony is reduced to written form.

While Recommendation 2 thus places significant limitations on the taking of depositions, it recognizes that fairness requires that parties to adjudicatory proceedings be able to take discovery depositions. Most agencies do encounter cases where there are factual conflicts which must be resolved by witness testimony from the stand. Surprise should play no part in these proceedings, and the parties should know ahead of time what testimony to expect from the principal witnesses against them. A party can obtain this knowledge by taking the witness' deposition. Depositions are also necessary to permit the parties to the proceeding (particularly private parties) to obtain full knowledge of the relevant facts. Counsel for the respondent or other private party often finds that the preparation of a particular case requires extensive investigation and the interviewing of a substantial number of persons. Often counsel will encounter a recalcitrant individual who for some reason refuses to cooperate and to disclose the evidence and leads of which he has knowledge. Agency counsel normally has the power in this situation to issue an investigatory subpoena and thus to compel cooperation. Fairness requires that the scales be equal and that respondent's counsel also have the power to compel the disclosure of all relevant, unprivileged information by obtaining a subpoena to take the deposition of the witness. Agencies which have only limited power to issue investigatory subpoenas prior to the commencement of any formal adjudicatory proceeding, such as the Bureau of Land Management of the Department of the Interior (see 43 U.S.C. §§ 102–106), also should find it helpful in many cases to be able to take prehearing depositions to round out and fill in the details of their case.

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[8] Recommendation No. 13 of the present Administrative Conference, adopted at the Octobe 1969 Plenary Session, urged the elimination of duplicative hearings in these FAA safety de certification cases.

Respondents in unfair labor practice cases before the NLRB and in restraint of trade or deceptive practice cases before the FTC frequently encounter uncooperative witnesses when they seek to interview their own employees or union members or the employees of a competitor. The FTC has resolved this problem by providing in its rules for discovery depositions. The problem remains acute at the NLRB, where there is the complicating factor that employees may well feel pressured by the inquiries of their employer or union. Under present law, it is proper for a respondent employer to interview his employees about matters alleged in an unfair labor practice complaint as long as he does not inquire about the contents of any statements they have made to the NLRB or ask them for copies thereof. *Texas Industries, Inc.* v. *NLRB*, 336 F. 2d 128 (5th Cir. 1964). Employees often refuse to cooperate in these interviews. Respondent's counsel may then seek relief by demanding that the Board allow him to take the employees' depositions. The General Counsel's Office takes the position that the applicable statute and regulations do not provide for depositions or other prehearing discovery in such cases. The General Counsel's position has generally been upheld in the courts. See *NLRB* v. *Globe Wireless Ltd.*, 193 F. 2d 748 (9th Cir. 1951), which held in addition that it was not a denial of due process to limit the respondent to subpoenaing witnesses to the hearing and to deny him the opportunity to take prehearing depositions. However, a recent Court of Appeals decision sympathized with the respondent's predicament and held that the NLRB's Rule 102.30 on Depositions was not limited to depositions for the preservation of testimony but authorized prehearing depositions for purposes of discovery. Rule 102.30, 29 C.F.R. 102.30 (1969), empowers the examiner upon application of a party to order the taking of a deposition "if in his discretion good cause has been shown." The court held that the examiner was in error when he ruled that he had no discretion to order prehearing discovery depositions. *NLRB* v. *Safeway Steel Scaffolds*, 383 F. 2d 273 (5th Cir. 1967).[9] The General Counsel's Office has not acquiesced in that decision.

The General Counsel's office does have a genuine basis for concern that prehearing depositions will lead to delay. However, once the delay problem is met, there are distinct advantages to depositions. Not only will the taking of depositions insure that all parties to the proceeding have full knowledge of the relevant facts but in addition the employee will have committed himself by testifying under oath and will be protected under 29 U.S.C. § 158(a)(4) from discharge or other discrimination because of his testimony. An employee should also feel more secure if he tells his story publicly under the compulsion of a subpoena to take his deposition than if he supplies it surreptitiously and voluntarily in an affidavit for an NLRB investigator. In the former case, the employee can at least tell his employer or union that he had no choice but to supply information.

Conditions on the Taking of Depositions. Recommendation 2 places six conditions on the taking of depositions in agency adjudications. The first condition provides that the taking of depositions should normally be deferred until there has been at least one prehearing conference. In civil litigation in the federal courts the pre-trial conference normally occurs after the parties have completed their discovery through depositions and written interrogatories and when the trial date is rapidly approaching. 3 Moore, *Federal Practice* par. 16.08 (2d ed. 1968). Discovery in administrative adjudications should follow the reverse order. The prehearing conference should come first and should serve as the pre-eminent discovery device. If the prehearing conference functions smoothly, there may be little need for further discovery. At the prehearing conference there should be a narrowing of the issues and an outlining of what discovery is really necessary. Once the issues have been narrowed much of the information or documents the parties anticipated obtaining through discovery may no longer be relevant. Furthermore once the respondent learns at the prehearing conference what evidence the agency plans to introduce against him, he may decide himself that it is no longer necessary to have as much formal discovery as he anticipated. See FTC Examiner John Lewis' Speech, *Discovery Techniques*, delivered to the Council on Antitrust and Trade Regulation of the Federal Bar Association on September 11, 1968, and reprinted 21 *Ad. L. Rev.* 457, 460–464 (1969). Normally the presiding officer should deny an application to take a deposition if he has not yet held a prehearing conference with the parties. However, cases may arise which are too straightforward to justify calling a prehearing conference and where a party may have good cause for taking one or two depositions. The presiding officer should have authority in cases such as these to order the taking of the depositions without first holding a pre-hearing conference.

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[9] Other Court of Appeals decisions have interpreted Section 10(b) of the Taft-Hartley Act, 29 U.S.C. 160(b) (1964), which requires that unfair labor practice proceedings shall "so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States," to authorize prehearing discovery and have indicated that the Board should provide discovery in appropriate cases. *NLRB* v. *Vapor Blast Manufacturing Co.*, 287 F.2d 402, 407 (7th Cir. 1961); *NLRB* v. *Southern Materials*, 345 F.2d 240, 244 (4th Cir. 1965).

The federal judges have adopted for the handling of protracted cases an analogous model for pre-trial and discovery procedures. That model recognizes that the judge in the "big" case must maintain firm control over the discovery proceedings and must hold pre-trial conferences at an early stage to define the issues and place reasonable bounds on discovery. Judicial Conference of the United States, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 1960, 25 F.R.D. 351, 385–398. It has been recognized that similar procedures are necessary for the protracted administrative case. Committee on Information and Education, Administrative Conference of the United States, *Recommended Procedures for Protracted Hearings before Administrative Agencies* 10–21 (Second Draft 1963). Discovery must follow a similar course in routine administrative adjudications if the administrative process is to survive as a quick, inexpensive way to adjudicate controversies. Litigants in the federal courts often can afford to spend several years on discovery because court calendars are so congested that they cannot obtain a speedy trial anyway. Agencies cannot afford such delays if they are to enforce the law and uphold the public interest. Parties therefore cannot be allowed to take depositions at their leisure.

The FCC's limited experience with its new discovery rules demonstrates the soundness of holding a prehearing conference before the parties are allowed to take depositions or pursue other means of discovery. The FCC discovery rules follow the normal federal practice and provide that the taking of depositions and the serving of written interrogations "shall be completed prior to the intitial prehearing conference" unless the presiding officer orders otherwise. Rule 1.311(c), 47 C.F.R. 1.311(c) (1969). FCC hearing examiners have on the whole reacted unfavorably to that agency's new discovery rules because the rules have inserted these forms of discovery too early into the process and have upset what had been a smoothly functioning prehearing procedure in which the examiners had required the parties to exchange their evidentiary exhibits and generally to disclose their cases. Examiner McClenning recognized this difficulty in his opinion of January 16, 1969, in *Snake River Valley Television, Inc.* (Docket #18739) where he stated that [n]either the relevancy nor materiality of the information sought [on written interrogatories] can be determined prior to the exchange of the affirmative evidentiary presentations and delineation of the areas of testimony . . ." *Id.* at p. 4. Discovery was also denied in that case because one party to the comparative hearing was seeking to obtain through interrogatories substantial portions of the competing applicant's affirmative case before it disclosed its own case at a prehearing conference. *Id.* at p. 5.

The second condition on the taking of depositions requires that the party seeking to take a deposition must apply to the presiding officer for an order to do so. The application should normally show the grounds for taking the deposition. Under the Federal Rules of Civil Procedure a party may take the deposition of a witness upon notice to the other parties and without any need for a court order or showing of good cause. Recommendation 2 does not adopt this practice but provides that the presiding officer must issue an order for the taking of a deposition. The purpose of this limitation is to insure that the presiding officer retains firm control over the discovery stage of the proceeding. The three following conditions further require that the other party or parties to the proceeding receive notice of the application to take the deposition and have, along with the deponent, an opportunity to contest it. The presiding officer should not grant the application if he finds that the taking of the deposition would result in undue delay. If the taking of the deposition will not result in undue delay, the presiding officer should then grant the application unless he finds that there is not good cause for taking the deposition.

The effect of this last provision is to require the presiding officer to find that there is "good cause" for taking the deposition but to shift the burden of persuasion on this issue from the applicant to the party or person opposing the deposition. The applicant therefore does not need to disclose in his aplication why he wants to depose a particular witness. Of course, nothing in Recommendation 2 prohibits the presiding officer from finding on his own initiative that good cause does not exist even though no one opposes the taking of the deposition. Such occurrences, however, should prove rare. The normal procedure would be for the deponent or for the agency staff or other party to the proceeding to oppose the application on the grounds that the information sought is irrelevant, cumulative or readily available elsewhere, or that for some other reason there is no "good cause" for taking the deposition. "Good cause" cannot be defined in the abstract but would normally involve some need on the part of the applicant to obtain information from the deponent. The presiding officer, however, should not deny reasonable requests for depositions simply because he is unsure what information would be uncovered. On the other hand, good cause may not exist where the applicant seeks to depose a prospective witness and where the opposing party has complied with Recommendation 3 by furnishing a narrative summary of the witness' expected testimony and, in the case of an agency witness, any prior statements of the witness relevant to the expected testimony. Unless the applicant demonstrates that the witness' credibility or perception of disputed events is a significant part of his expected testimony, the applicant does not have good cause to depose him. The deposition would not furnish the applicant with any additional relevant information.

Depositions of Agency Personnel. The sixth and final condition in Recommendation 2 on the taking of discovery depositions limits the deposing of agency employees. Agencies generally resist the application of this form of discovery against themselves. Only the FMC allows a private party to take routinely a deposition of an agency employee. 46 C.F.R. 502.209 (1969).[10] Many agencies are reluctant even to allow private parties to subpoena agency employees to testify at the hearing itself. Practitioners before the INS complain that it is quite difficult to subpoena a Service employee to testify at a deportation hearing on such matters as the facts surrounding an alien's arrest or on the possible misplacing of a document by the agency. Under NLRB Rule 102.118(a), 29 C.F.R. 102.118(a) (1969), an officer or employee of the agency is not to respond to a subpoena without the consent of the General Counsel or the Board. In the past the General Counsel simply refused to give his consent when he did not want the employee to testify. Courts have now interpreted the Rule not to create any privilege but to require the General Counsel to give his consent when the respondent is seeking relevant, unprivileged evidence from the employee. *NLRB* v. *Capitol Fish Company*, 294 F. 2d 868 (5th Cir. 1961) (testimony of Board attorney who had allegedly obtained false and twisted statements from prospective witnesses); *General Engineering, Inc.* v. *NLRB*, 341 F. 2d 367 (9th Cir. 1965) (testimony of Board counsel who stated at a prior hearing that employee had been properly reinstated when the Board's later position was that he had not been reinstated).

These decisions recognize that basic fairness requires that a private party to an agency adjudication be able to subpoena at the hearing an agency employee to testify to at least his first-hand knowledge of the case. Otherwise the private party will be foreclosed from fully presenting his side of the case and the presiding officer will decide the case on less than all the available facts. If the purposes behind discovery are to be fully carried out, the private party should be able to take the employee's deposition to learn prior to the hearing the facts of which he has knowledge and on which he would testify. However, there is a danger that private parties will abuse this right. Employees of already understaffed agencies will have to spend a day or so being deposed when their time could be much better spent in the public service. Furthermore, written interrogatories directed to the agency may supply the private party with all the information he needs. These points influenced the FCC to prohibit the deposing of FCC personnel "except on special order of the Commission." 47 C.F.R. 1.311(b) (2) (1969).

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[10] FTC Rules 3.33 (Depositions), 3.34 (Subpoenas) and 3.36 (Form of and rulings on applications for subpoenas for confidential records of the Commission; for appearance of Commission employees; appeals; review) are broad enough when read together to require an FTC employee to respond to a subpoena issued by the examiner for the taking of his deposition. However, many on the FTC's staff believe that the rules do not contemplate the taking of an FTC employee's deposition. In any case, the rules do not appear to have been used for that purpose.

Recommendation 2(6) provides a fair and workable compromise on this issue which relieves the agency staff of the burden of depositions in routine cases while allowing a private party to take the deposition of an agency employee in the unusual case where there is a real need to do so. The presiding officer, who is more familiar with the case than the agency head or members, must initially decide whether the party applying to take the deposition is seeking "significant, unprivileged information not discoverably by alternative means." Any order of the presiding officer granting an application to depose an agency employee is subject to an interlocutory appeal to the agency. Depositions of agency members function primarily as judges, only in rare instances should they be subpoenaed to testify at the prehearing stage or at the hearing itself. *San Francisco Mining Exchange*, 41 S.E.C. 860 (1964), *aff'd* 378 F. 2d 162 (9th Cir. 1967).

Recommendation 2 does place those agencies which adjudicate at an advantage over those agencies which must enforce the law through civil actions in the federal district courts. The latter agencies are subject to the deposition provisions of the Federal Rules of Civil Procedure, which make no exception for agency personnel. FDA laboratory personnel and outside consultants are frequently deposed in seizure and injunction actions brought against mislabeled or adulterated food and drugs. To a lesser extent, Wages and Hours Inspectors in the Department of Labor have their depositions taken by employers defending cases brought under the Fair Labor Standards Act. The taking of these depositions does not seem to hinder the work of the agencies involved or hurt their performance. While depositions of agency personnel are thus commonplace in the federal courts, one court recently held that written interrogatories were the preferred method for obtaining discovery from an agency. *Southern Bell Telephone & Telegraph* v. *EEOC*, 24 Ad. L. 2d 1099 (E.D. La. 1969).

DISCOVERY RECOMMENDATION 3. WITNESSES

(a) *Prior Statements*

At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the federal government.

(b) *Narrative Summaries of Expected Testimony*

At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3(a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

Summary of Discovery Recommendation 3. Recommendation 3(a) requires the agency to produce prior to the hearing any prior "statements" (as defined in the recommendation) of agency witnesses which are in the possession of the agency or obtainable by it from any other federal agency and which relate to the subject matter of their expected testimony. The recommendation only applies to adjudications where the agency staff participates as a party. Recommendation 3(b), on the other hand, requires all parties to an adjudicatory proceeding to produce prior to the hearing the names of the witnesses they expect to call and a narrative summary of their expected testimony. Both recommendations are flexible on matters of timing and only require the production of the prior statements and narrative summaries at a prehearing conference or at some other "reasonable time" prior to the hearing. The parties should normally resolve among themselves scheduling problems which arise. The presiding officer, of course, retains ultimate control over the discovery process and should resolve any disputes between the parties. In cases where the presiding officer holds a prehearing conference under

Recommendation 1,[11] he should arrange at that time for the production of the prior statements and narrative summaries. This production could be contemporaneous with or subsequent to the exchange of witness lists contemplated by Recommendation 1.

The dual purposes behind these recommendations are to insure full discovery in agency adjudications (particularly to private parties to the proceedings) and to obviate the need for extensive, time-consuming depositions of prospective witnesses. No doubt these recommendations are controversial ones, because they propose something which is basically new and untested. But it is only through innovations that the administrative process can be significantly improved. To understand the effect of these recommendations it is first necessary to describe the development of the Jencks rule and existing agency practices with respect to witness testimony.

The Jencks Rule. In *Jencks* v. *United States*, 353 U.S. 657 (1957), the Supreme Court formulated a general rule of evidence that a defendant in a federal criminal case is entitled to all prior statements by prosecution witnesses in the possession of the prosecution which concern the same events and activities as their testimony. Following the decisions in *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314 (D.C. Cir. 1958), and *NLRB* v. *Adhesive Products Corp.*, 258 F. 2d 403 (2d Cir. 1958), the application of the *Jencks* rule to administrative adjudications and to agency enforcement actions brought in the courts has been uniformly accepted. The basis for the rule is that the government in enforcing the law must play fair with the defendant or respondent. Agency rules and decisions generally provide that the respondent is entitled at the end of an agency witness' direct testimony to inspect any prior statements of that witness which relate to the subject matter of his testimony. These provisions reflect or copy the Jencks Act, 18 U.S.C. § 3500, in which Congress codified fairly restrictively the *Jencks* decision. Under that statute a defendant in a federal criminal prosecution is entitled after a government witness has testified on direct examination to any prior "statement" by that witness in the possession of the United States which relates to the subject matter of the testimony. Pre-trial production of such statements is not authorized. See *Palermo* v. *United States* 360 U.S.

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[11] Recommendations 3(a) and 3(b) require production by the parties whether or not there is a prehearing conference. The successful operation of these recommendations, however, may often depend on the presiding officer holding a prehearing conference and asserting control over the discovery process. The presiding officer has discretion under Recommendation 1 to hold one or more prehearing conferences.

343, 349 (1959). "Statement" is defined to include only a signed or adopted written statement or a recording or transcription which is a substantially verbatim recital of an oral statement.[12] Both the *Jencks* decision and Jencks Act make clear that the reason for requiring production of prior statements is to permit defense counsel to impeach or otherwise discredit the government's witnesses at trial.

Present Agency Practice. In administering the *Jencks* rule agencies have generally followed the definition of "statement" in the Jencks Act and have delayed the production of prior statements until after the statement-giver has completed his direct testimony. See, e.g. the NLRB Rule, 29 C.F.R. 102.118(b). Agencies have resisted the prehearing disclosure of a witness' prior statements on the grounds that they deserve confidential treatment as part of the agency's investigatory files and work product. Agencies have also invoked the informer's privilege to prevent the prehearing disclosure of the statements of witnesses. Both the Wages and Hours Adminstration in the Department of Labor and the NLRB have strongly resisted the pre-trial disclosure of informer's statements, or even of the fact that a person supplied information. Despite broad provisions for discovery in the Federal Rules of Civil Procedure, court decisions in enforcement actions under the Fair Labor Standards Act have generally upheld the Department of Labor's claim of the informer's privilege in refusing to disclose the identity of its informants and to produce their statements. *Mitchell* v. *Roma,* 265 F.2d 633 (3rd Cir. 1959); *Wirtz* v. *B.A.C. Steel Products, Inc.,* 312 F.2d 14 (4th Cir. 1962); contra, *Wirtz* v. *Rosenthal,* 388 F.2d 290 (9th Cir. 1967) (special circumstances of non-employee informers). The Department's claim of privilege has been upheld when it refused to disclose prior to trial whether a prospective witness was an informer who had given a prior statement. *Wirtz* v. *Robinson & Stephens, Inc.,* 368 F.2d 114 (5th Cir. 1966). Of course, the informer's statements themselves are producible under the *Jencks* rule once the informer takes the witness stand in court. At that point the employer or other defendant learns whether the witness served as an informer and gave a prior statement.

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[12] The complete definition of "statement" reads as follows:

"The term 'statement' . . . means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. 3500 (e) (1964).

The INS takes the same position as the Department of Labor, although it has not yet had to defend its practice in the courts.

The FTC has recently held that informers' statements constitute part of the agency's work product and are not discoverable by the respondent under the agency's rules for prehearing discovery. Allied Chemical Corp., 3 Trade Reg. Rep. par. 18,654 at 21,020 (FTC 1969) (Commissioners Elman and Nicholson dissented). The FTC even allows its investigators to take down statements from informers who are prospective agency witnesses in a non-verbatim fashion with the result that they are not normally producible at the hearing itself under the FTC's version of the *Jencks* rule. The FTC maintains that these interview reports are generally not the "statement" of the witness but the subjective summary of the investigator and therefore should not be available to the respondent even for impeachment purposes. *Inter-State Builders, Inc.*, 3 Trade Reg. Rep. par. 18,040 at 20,460 (FTC 1966); *Star Office Supply Co.*, 3 Trade Reg. Rep. par. 18,520 at 20,874 (FTC 1968) (Commissioner Elman dissented in both cases). The FTC practice has been sharply criticized by scholars. Gellhorn, The Treatment of Confidential Information by the FTC: The Hearing, 116 *Univ. of Pa. L. Rev.* 401, 428–433 (1968). Practitioners interviewed in the preparation of this report were unhappy about the FTC's position because it deprives them of information which might prove useful on cross-examination. Exculpatory material may also remain buried in the files when the interview reports are not produced at the hearing after the witness testifies. Furthermore, if the investigator is an attorney preparing a case for trial the FTC practice is an inefficient way to take a statement. The almost uniform practice in the other agencies is for the interviewer to arrange for a verbatim transcription of the informer's oral statement or to have the informer sign or adopt a written statement. Such statements are of course producible under the *Jencks* rule when the informer testifies at the hearing and at times prove quite valuable to respondent's counsel for purposes of cross-examination. The FTC itself has instructed its staff to follow that practice in cases where the staff determines that the strong testimony of witnesses is needed to prove the agency's case. The SEC follows this practice in all cases and applies a much more liberal *Jencks* rule than does the FTC. The SEC produces, often before a witness' direct testimony or even before the hearing itself, anything in its files which might be considered a prior statement.

Discovery Recommendation 3(a). Recommendation 3(a) transforms the *Jencks* rule from a rule of evidence into a rule of discovery. The prohibition which the Jencks Act places on pretrial discovery of prior statements and its restrictive definition of "statement" apply only to federal criminal prosecutions and not to agency adjudications. Administrative agencies are free to adopt more liberal policies on disclosure of an agency witness' prior statements. Recommendation 3(a) therefore somewhat broadens the definition of "statement" and proposes that the agency produce the prior statements of its witnesses at the prehearing stage, rather than at the completion of each witness' direct testimony.

Recommendation 3(a)'s definition of "statement" resembles the definition of "statement" in the Jencks Act but is less complex and technical. The definition includes any written statement signed or adopted by the witness and any recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to a government agent. The recommendation should encourage agencies to adopt a liberal policy on the production of statements and to produce any statements which accurately reflect the witness' own words. This definition of "statement" omits any requirement, such as that found in the Jencks Act's definition, that the recording of the oral statement must be a "contemporaneous" recording. The basis for this omission is that if the agency has a statement containing the actual words of the witness it should be willing to produce that statement and to hold the witness to his words. The fact that the statement was not recorded contemporaneously or that the original, contemporaneous recording has been destroyed or disappeared should not prevent the production of a subsequent recording. The agency normally has the means to insure that any subsequent recording or transcription of the recollections or report of a government interviewer is accurate and complete. The broadened definition of "statement," however, is not intended to cover efforts by the interviewer months or years after the interview to reconstruct from memory the contents of a witness' statement. The resulting product is unlikely to be "substantially verbatim" and may not fairly be characterized as a "recording" of the original statement.

Both the Jencks Act and Recommendation 3(a) define "statement" so as to limit the government's duty to produce recordings and transcriptions of oral statements to those recordings and transcriptions which are "substantially verbatim" recitals. The agency need not produce an interviewer's summary of or excerpts from the oral statement of a witness. See *Palermo* v. *United States*, 360 U.S. 343, 352-353 (1959). The majority of the American Bar Association's Advisory Committee on Pretrial Practices has rejected this limitation for criminal trials. ABA, *Standards Relating to Discovery* 61–63 (Tentative Draft, May 1969). Standard 2.1(a)(i) proposed by the committee simply requires the pretrial production of the "relevant written or recorded statements" of the government's witnesses. The Commentary accompanying this provision states that the "Advisory Committee intends that the term ["statement"] be given a broad meaning so as to include generally any utterances of the statement-giver which are recorded by any means in whole or in part, and regardless of to whom they were made. . . ." *Id.* at 61–62. Standard 2.1(a)(i) thus requires the production of interview notes, even if the notes are only jottings to aid the investigator in later compiling his formal report. Production is not required, however, of those portions of an interview report which contain the investigator's impressions and summary. In the opinion of the majority of the Advisory Committee, "statements" of government witnesses that do not contain substantially verbatim the words of the statement-giver should still prove useful to defense counsel in preparation for plea or trial even though such statements should play a restricted role in the impeachment of the witness. *Id.* at 63.

The views of the majority of the Advisory Committee carry considerable force. The defendant should know in advance the substance of the testimony against him. However, furnishing defense counsel with jottings, scribblings and other work papers of the prosecutor is an awkward way to accomplish this goal. Not only does it tempt the prosecutor to destroy such papers or not to write down anything, but it constitutes an intrusion into the internal operation of the prosecutor's office. Recommendation 3(b) adopts a better approach to achieve in administrative proceedings the same goal of informing the party proceeded against of the substance of the testimony against him. If the agency staff does not have a "statement" of a witness covered by the definition of "statement" in Recommendation 3(a), it must still comply with Recommendation 3(b) by furnishing the other parties to the proceeding with a narrative summary of the witness' expected testimony. The staff will be identified as the author of the narrative summary, which will not constitute a statement of the witness for impeachment purposes. The respondent will have discovered the substance of the testimony against him without having unduly pried into the agency's investigatory files.

Recommendation 3(a) also conforms with the Jencks Act in requiring the production of all prior written statements signed or adopted by a witness regardless of to whom the statements were made and of the recordings of all prior oral statements made by the witness to an agent of the federal government. The statements need only be relevant to the expected testimony and "in the possession of the agency or obtainable by it from any other federal agency." Thus, the agency cannot refuse production of prior statements simply because the statements were given to another federal agency and repose in its files. Agency rules may not limit the availability of prior statements to those which are in the possession of the particular federal agency conducting the hearing. *Harvey Aluminum* v. *NLRB*, 335 F.2d 749, 754 (9th Cir. 1964). Agencies must seek to obtain such statements to insure that their own proceedings are fair. Federal agencies should cooperate and share the statements in their files with other agencies when the need arises. The Jencks Act itself demands no less; it requires the United States Attorney in a criminal prosecution to produce all relevant prior statements "in the possession of the United States." 18 U.S.C. 3500(b).

Prehearing production of the prior statements of agency witnesses should have a beneficial effect in speeding up the adjudicatory process. The respondent or other private party learns what the witnesses against him have to say and can determine if further investigation or discovery is needed to meet their testimony. The American Bar Association's Project on Minimum Standards for Criminal Justice has formulated a similar recommendation for criminal trials. Standard 2.1(a)(i) of the ABA *Standards Relating to Discovery* (Tentative Draft, May 1969) provides that the prosecutor must produce prior to trial the relevant written and recorded statements of the witnesses he intends to call. The accompanying Commentary acknowledges that pretrial disclosure of such statements is not the norm in the overwhelming majority of jurisdictions and bases its recommendation on four fundamental principles": 1) Fairness requires that the statements be disclosed during trial in any events; 2) If the disclosures are made prior to trial, the delays and inconveniences occasioned by disclosure during trial will be avoided; 3) To permit the defense to adequately prepare for trial and to minimize surprise, disclosures should be made prior to trial; and 4) Any valid reason for denying or delaying a given disclosure can be taken into account by the trial judge in formulating a protective order for a particular case. *Id.* at 57–58. The inconveniences associated with delaying the production of *Jencks* statements until the completion of a witness' direct testimony have already prompted many federal trial judges, without clear authority to do so, to require the prosecution to produce the statements at any earlier stage.

These reasons for the pretrial production of a government witness' prior statements are applicable to administrative adjudications. The prehearing production of these statements should furnish the respondent or other private party with considerable discovery and significantly reduce his need to take depositions and pursue other formal means of discovery. This aspect of Recommendation 3(a) is discussed below in conjunction with the similar beneficial effect on the discovery process of Recommendation 3(b).

The 1968 California statute on discovery in administrative hearings reflects the approach of Recommendation 3 and requires all parties (including the agency) to make available for inspection and copying the prior statements of: (1) witnesses proposed to be called by the party; and (2) other persons having personal knowledge of the acts, admissions or events which are the basis for the proceeding. *Cal. Gov't Code* 11507.6(c). The second provision on its face abolishes the informer's privilege and thus goes much further than Recommendation 3(a), which coincides with the first provision of the California statute. While the new California statute provides for extensive discovery in administrative proceedings, it makes no provision at all for depositions. Rather, the statute relies on the prehearing discovery of statements as providing an adequate substitute for depositions. In criminal cases the California courts have also allowed broad discovery on behalf of the defense but have not gone so far as to permit the defendant to take depositions. Under California's system of judicially fashioned discovery in criminal proceedings the defendant can obtain before trial the prior statements of the prosecution's witnesses but not the statements of other informers which might happen to be in the prosecutor's files. *People* v. *Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959); *People* v. *Cooper*, 53 Cal. 2d 755, 349 P.2d 964 (1960).

Effect of Discovery Recommendation 3(a) on Agency Practice. Agencies should generously comply with Recommendation 3(a) and not adopt investigatory practices which circumvent it. Investigators should be instructed that when they take the statement of a witness they should do so in such a way that the statement is producible under this recommendation. Personal observations and comments of the investigator should be reported separately and not included in the witness' statement. This is a sound way to take a statement; it separates the witness' words, which are producible, and the interviewer's reactions, which are not. The contrary practice of FTC investigators, who generally combine in their reports both the witness' statements and their own impressions, has come close to making the *Jencks* rule a "dead letter" at the FTC. *Interstate Builders, Inc.*, 3 Trade Reg. Rep. par. 18,040 at 20,460, 20.4 (Commissioner Elman dissenting).

Agencies should also generously favor discovery in determining whether a particular statement is "substantially verbatim." The standard intended to be followed here is that applied by the federal courts under the Jencks Act and not some narrower standard formulated by an agency. For a statement to be producible it need not be precisely verbatim or contain the exact words and punctuation of the statement-giver, *U. S.* v. *McKeever*, 271 F.2d 669, 675 (2d Cir. 1959). Indeed under the federal practice the defendant generally obtains any statements that record with substantial accuracy and completeness what the witness said. Judicial standards should also govern situations where the investigator himself or some other agency employee becomes a witness for the agency in the proceeding. Reports that contain his prior reactions and recommendations on the case and other internal working documents prepared by him are not "statements" under the Jencks Act. However, if the agency employee testifies concerning his knowledge of the facts or concerning an interview with a witness, his report on these factual matters are written "statements" that must be produced. *U.S.* v. *Sheer*, 278 F.2d 65 (7th Cir. 1960); *Karp* v. *U.S.*, 277 F.2d 843 (8th Cir. 1960). Any irrelevant or non-producible portions of those reports may naturally be excised.

Recommendation 3(a) does not upset the legitimate desire of agencies to protect the confidentiality of their informers. The *Jencks* rule already compels the agency to disclose at the time a witness testifies whether or not he was an informer who gave a prior statement. No one presently disputes this as a requirement of fair play. If the agency wants to keep its informer secret, it cannot call him as a witness. All that the recommendation requires is that the agency disclose at a somewhat earlier point that a witness it plans to call was an informer who gave a prior statement. The agency retains considerable flexibility in timing the disclosure, which may take place at a prehearing conference or at some other reasonable time prior to the hearing and may be either contemporaneous with or subsequent to the exchange of witness lists required by Recommendations 1 and 3(b). The present recommendation also should not handicap agencies in obtaining statements from informers because an agency can still promise its informers adequate confidentiality. The NLRB provides a good case in point. Presently the NLRB promises informers that their identities and statements will be kept confidential until they are called to testify. Under the proposed recommendation, NLRB investigators can still promise informers that their identities and statements will be kept confidential until a formal proceeding is instituted and they are designated as witnesses. It is hard to see how disclosing at the prehearing stage, rather than at the hearing itself (as required by the present *Jencks* rule), the fact that a witness was an informer and gave a statement will expose that witness to any greater reprisals. See *NLRB* v. *Schill Steel Products, Inc.*, 408 F.2d 803, 807 (5th Cir. 1969) (denial of petition for rehearing). *Schill* was a contempt proceeding where the Fifth Circuit appointed a special master with authority to order that the agency permit the respondent to discover all statements made to the NLRB or its agents by witnesses whom the agency planned to call at the contempt hearing. The decision approved this form of discovery and distinguished it from the discovery denied in *NLRB* v. *Clement Bros. Co.*, 407 F.2d 1027, (5th Cir. 1969), where the respondent in an unfair labor practice case demanded all informer's statements in the NLRB's possession and not just those of prospective witnesses. To require the production of all statements would in effect abolish the informer's privilege. The General Counsel's Office, however, does not acquiesce even in the much more limited *Schill* decision.

The prehearing disclosure of the prior statements of agency witnesses should result in greater fairness in agency adjudication without any undue impingement on the confidentiality of investigatory files and of "work product". While such a procedure may require the agency to disclose some of its work product, the *Jencks* rule already requires that and to that extent is at odds with the protection afforded work product by *Hickman* v. *Taylor*, 329 U.S. 495 (1947). See Cleary, *Hickman* v. *Jencks*, 14 *Vand. L. Rev.* 865 (1961). When a government agency enforces the law, the demands of fair play may sometimes require that the agency not sit on its work product but make it available to the respondent or other private party to the proceeding. While this disclosure requirement normally should not apply to the work papers or subjective impressions of agency personnel, it should apply to the prior statements of witnesses obtained by the agency. These statements are not only useful to the respondent for impeachment purposes but are also useful at the discovery stage to help the respondent prepare for the hearing.

Agencies, like all litigants, tend to develop overly expansive notions of their work product that must be protected from discovery. The agency's entire investigatory file does not constitute work product. This is particularly true of statements of witnesses in the file. Professor Moore argues vigorously that *Hickman* v. *Taylor* only gives work product protection to statements and other material acquired by an adversary's attorney in anticipation of litigation or in preparation for trial and does not cover statements obtained by claims agents, investigators, and the like. 4 Moore, *Federal Practice* par. 26.23 [8.–1] (2d ed. 1969). Even statements of witnesses which constitute the work product of an attorney are discoverable by his adversary upon a showing of good cause, defined in *Hickman* v. *Taylor as* "necessity or justification" where the denial of discovery would "cause hardship or injustice." 329 U.S. 495, 509–10 (1947). The lower court decisions following *Hickman* v. *Taylor* are in conflict on whether this work product protection extends to statements obtained by nonlawyers. Professor Moore argues that *Hickman* v. *Taylor* itself involved statements taken by an attorney in anticipation of litigation and that the policy behind the decision was solely to protect the files and mental impressions of an attorney working on a case. 4 Moore, *Federal Practice* par. 26.23 [8.–1] (2d ed. 1969).

The majority of the decisions seem to support Professor Moore. Under this view of work product, many statements in an agency's files are not work product because they were not taken by an attorney acting in his professional capacity but by an agency investigator.[13] As stated by Judge Miller in *Durkin* v. *Pet Milk Co.:*

> "Insofar as the work product of a lawyer is concerned, an investigator employed by the Department of Labor is in no different category than an investigator or claim agent employed by a private person or company, and the mere fact that an attorney gives such an investigator or claim agent general instructions as to how to conduct the investigation is not sufficient to constitute the investigator's work a part of the work product of the lawyer directing him to make the investigation."
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> 14 FRD 325, 394 (W.D. ARK. 1953)

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[13] These statements may still be protected by the informer's privileges, but that privilege is lost when the informer becomes a witness. The government cannot keep the identity of its witnesses secret, *Smith v. Illinois*, 390 U.S. 129 (1968), nor deny they made prior statements to the government, *Jencks* v. *United States*, 353 U.S. 657 (1957).

The leading decision contrary to Professor Moore's position is *Alltmont* v. *United States*, 177 F.2d 971 (3rd Cir. 1949), which held that statements obtained for the government by FBI agents were work product under *Hickman* v. *Taylor* because that decision applied to all statements of prospective witnesses which a party had obtained for his trial counsel's use. Of course, written statements of witnesses in the possession, custody or control of a party, even if the statements are not considered work product, are only producible in the federal courts under Rule 34 on the Discovery and Production of Documents and Things upon a showing of "good cause." *Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962). However, the "good cause" required for the production of these statements under Rule 34 is substantially less than the "good cause" required for the discovery of work product. A party seeking production normally need only show that he cannot obtain similar statements from the witnesses because the witnesses are unavailable or hostile. 4 Moore, *Federal Practice* par. 26.23 [8.-2] (2d ed. 1969).

Pre-trial production of the prior statements of witnesses is thus not unknown in civil actions in the federal district courts. There is no sound reason for agencies to be apprehensive about the extension of this practice to agency witnesses in administrative adjudications. While only the agency, and not a private party to the proceeding, must provide the prior statements of its witnesses under Recommendation 3(a), the agency will receive under Recommendation 3(b) narrative summaries of the expected testimony of its adversaries' witnesses.

Discovery Recommendation 3(b). Recommendation 3(b) seeks to insure that a party to an adjudicatory proceeding obtains adequate discovery of the testimony of his adversary's witnesses without the need for the time-consuming and expensive process of taking their depositions. Recommendation 2 provides for depositions on oral examination and on written questions; and a party may find it necessary, or be tempted for purposes of delay, to depose all the potential witnesses against him. Counsel for a respondent or other private party who is interested in delay may even stage a "dry run" of the trial by deposing all the agency's witnesses. Recommendation 3(b) controls this practice by furnishing the party with a narrative summary of the witnesses' expected testimony and thus making unnecessary in a great many instances the taking of depositions.

The FTC has had considerable experience with this problem of delay associated with attempts to depose agency witnesses.

At one time it met the problem by taking the position that its Rule 3.33 on Depositions did not permit the deposing of complaint counsel's witnesses on matters with regard to which they were expected to testify at the hearing. *Associated Merchandising Corp.*, 3 Trade Reg. Rep. par. 18, 102 at 20, 547 (FTC 1967). The FTC has changed its position and now permits depositions for the purpose of discovering the testimony of prospective witnesses. *Koppers Company*, Dkt. 8755, FTC July 2, 1968 (unreported). While the latter decision is more consistent with the purposes of discovery, the deposing of agency witnesses must be kept within reasonable limits and is not always really necessary. Some FTC examiners are now meeting this problem by requiring complaint counsel to furnish respondent at the prehearing conference with a narrative summary of the expected testimony of each agency witness. When the respondent learns the substance of the witnesses' testimony in this fashion, he often decides that there is no need to take the trouble of deposing them. If the respondent is not satisfied with the narration, he can ask that he be supplied a clarification or further narrative statement. This procedure has worked well in a number of FTC cases to reduce significantly the number of depositions.

Recommendation 3(b) adopts the FTC practice and expands it to require all parties to the proceeding (and not just the agency) to furnish at some reasonable time prior to the hearing narrative summaries of the expected testimony of their witnesses. Recommendation 3(a), on the other hand, only requires the agency staff (and not private parties) to produce prior statements of witnesses. This different treatment in Recommendation 3(a) of the agency and private parties can be explained on several grounds: 1) the *Jencks* rule, which has been transformed by Recommendation 3(a) into a rule of discovery, presently only applies to government witnesses; 2) the government's superior ability in obtaining statements and its interest in uncovering the truth rather than in winning the case combine to subject it more readily to the fairness requirement that it share its statements with the other parties; and 3) considerations of work-product and of the attorney-client privilege more readily protect statements obtained by private parties and their privately retained attorneys than those obtained by government investigators. These considerations do not apply to the prehearing production of the narrative summary of a witness' expected testimony where the goal is to avoid surprise at the hearing by informing the other parties of the witness' position. The agency is as much entitled as any other party not to be surprised at the hearing and know ahead of time the gist of the testimony against it. Discovery must be a two-way street. Of course, the "reasonable time" under Recommendation 3(b) for the respondent or other private party to produce the narrative summaries for its witnesses may be, for the great majority of cases, subsequent to the time the agency produces its narrative summaries. Fairness may require that the agency disclose its case first. See discussion of this problem in the *Exchange of Evidentiary Exhibits and Witness Lists* under Recommendation 1.

Agency counsel in an adjudicatory proceeding must comply with both Recommendation 3(b) on narrative summaries and with Recommendation 3(a) on prior statements. This dual requirement should not prove too burdensome because in a great number of cases agency counsel should be able to satisfy the requirement that he make available a narrative summary of the expected testimony of an agency witness by simply designating one or more of the witness' prior statements as a "narrative summary." Recommendation 3(b) specifically authorizes him to do that. Of course, if agency counsel ascertains that the prior statements are incomplete summaries of the testimony he expects from the witness, he must supplement the statements with a narrative summary of the omitted areas of testimony. Agency counsel naturally retains the option of drafting his own narrative summary rather than relying on the witness' prior statements.

Recommendation 3(b) also requires the prehearing exchange between the parties of the names of their witnesses. If the parties must make available narrative summaries of the expected testimony of their witnesses they are in effect disclosing their witness lists. This feature of Recommendation 3(b) supplements the provision in Recommendation 1 on the exchange of witness lists. The provision in Recommendation 1 on the exchange between the parties of evidentiary exhibits and witness lists only applies if the presiding officer holds a prehearing conference and directs the parties to make the exchange. While that recommendation gives the presiding officer the authority to do both of those things, his decisions are largely discretionary and he may choose not to hold any prehearing conference or to hold a conference but not to direct the exchange. Recommendation 3(a) insures that there will be a mutual disclosure of witness lists (and of narrative summaries) prior to the hearing regardless of the action of the presiding officer. The mutual exchange of evidentiary exhibits, however, remains dependent on favorable action by the presiding officer under Recommendation. 1. This difference in treatment between witness lists and evidentiary exhibits is sound because in a significant number of cases the disclosure of the names of witnesses is a simple matter which the parties can readily handle among themselves while the exchange of exhibits may become quite complex and function smoothly only if the presiding officer asserts control over the process.

It must be acknowledged, however, that the preparation of witness lists and of narrative summaries of the witnesses' expected testimony imposes significant burdens on the parties and their counsel. Furthermore, the timing of the exchange and the adequacy of the narrative summaries may often raise questions requiring the intervention of the presiding officer, who may find it advisable to call a prehearing conference to resolve them. These disadvantages are more than offset by the significant discovery afforded to the parties. Once the exchange has taken place the parties may also be able to agree among themselves to introduce at the hearing much of the witnesses' testimony in written form. Such agreements should greatly shorten the time required for the hearing.

A number of agencies, most notably ICC and the CAB, have developed special procedures whereby the parties to a proceeding exchange prior to the hearing the complete narrative testimony of their witnesses. These procedures, which go beyond the minimum standards proposed by Recommendation 3(b), are particularly suitable for economic proceedings where the primary facts are not really in dispute. Development of new procedures along these lines should be encouraged wherever appropriate because they serve the dual objectives of providing the parties with full discovery and of expediting the course of the hearing. Where the parties exchange prior to the hearing the complete narrative testimony of their witnesses, they naturally do not have to furnish in addition narrative summaries. The former procedure more generously provides for discovery than does the latter and is in full compliance with Recommendation 3(b).

Limited Role of Depositions. These Discovery Recommendations recognize that the most effective means of discovery in administrative adjudications is the mutual exchange of information between the parties. This mutual exchange functions best under the direction of the presiding officer at a prehearing conference. Other, more formal means of discovery (such as the taking of depositions) play a secondary role; they only provide a party with discovery that he was unable to obtain through mutual exchanges at the prehearing stage. A party that obtains an informative narrative summary of the expected testimony of his opponent's witness may conclude that he has no need to depose the witness. The deposition would add nothing to the narrative summary. If the party seeks to depose the witness anyway, the presiding officer may find under Recommendation 2(5) that the party does not have good cause to take the deposition. Of course, if the witness' perception or observation of disputed facts is relevant, the deposition should be allowed because in this case the narrative summary does not adequately replace deposition on oral examination for discovering the relevant facts. These instances should prove exceptional because a witness' personal observation of past events is only rarely as crucial in administrative adjudications as it is in personal injury and criminal cases.

Recommendations 3(a) and 3(b) operate jointly to limit the respondent's needs to depose agency witnesses. Only in a limited number of instances should the respondent have good cause, as required by Recommendation 2(5), for deposing an agency witness when he has already obtained a narrative summary of the witness' expected testimony and any prior statements of the witness relevant to the expected testimony. The ABA *Standards Relating to Discovery* (Tentative Draft, May 1969) also reflect this approach; they do not provide at all for depositions in criminal trials but rely on the prosecutor's production of the prior statements of the government's witnesses to afford the defendant adequate discovery of their testimony.

DISCOVERY RECOMMENDATION 4. WRITTEN INTERROGATORIES

(a) *Availability*

A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of an answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

Written Interrogatories in Agency Adjudication. Written interrogatories to parties, provided for in Rule 33 of the Federal Rules of Civil Procedure, have been widely employed in litigation in the federal courts. Once again there has been little experience with their use in administrative adjudications. Agency rules generally contain no provisions on written interrogatories. FCC Rules 1.311 and 1.323, 47 C.F.R. 1.311 and 1.323 (1969), do sanction their use, and parties to FCC proceedings have been taking increasing advantage of these rules in recent months. FMC Rule 12(f), 46 C.F.R. 500.206 (1969), also specifically authorizes parties to serve written interrogatories on each other; it has proved useful in complaint proceedings brought by private parties. Respondents are able to ascertain the factual basis for the complaint by serving written interrogatories on the complaint. When the FTC adopted its broad discovery rules in 1961, it deliberately omitted any provision on written interrogatories to parties. Under the FTC rules, however, it is possible to take a party's deposition upon written interrogatories. The FTC apparently believes that written interrogatories will result in unnecessary paperwork and that if one party wants seriously enough to obtain certain information from another party, he can take that party's deposition. Perhaps the FTC is also reluctant to impose on complaint counsel the burden of answering written interrogatories.

Discovery Recommendation 4(a). Recommendation 4(a) approves the use of written interrogatories in agency adjudications. Written interrogatories are a standard, inexpensive discovery tool which should be available in adjudicatory proceedings before administrative agencies. The practitioners interviewed in the preparation of this Report generally favored permitting their use because they provide an easy, inexpensive way to discover the basis of an opponent's case. Depositions are often not a proper substitute because of the expense they involve. In addition, written interrogatories provide a much needed vehicle for inquiring of another party about the existence and location of documents and other relevant evidence. A party needs this information if he is to obtain adequate discovery of documents and tangible things, because Recommendation 6 on the Production of Documents and Tangible Things follows the present Rule 34 of the Federal Rules of Civil Procedure and requires the party who is seeking discovery to designate the documents and things he wants. If a party is to obtain adequate discovery under this type of rule, there must be available a mechanism whereby he can discover what documents and tangible things other parties have in their possession, custody or control. Written interrogatories are such a mechanism.

Recommendation 4(a) does not require that a party obtain an order from the presiding officer to serve written interrogatories on another party. The provision in Recommendation 2 that a party seeking to take a deposition first apply to the presiding officer for an order to do so is not an appropriate limitation on the serving of written interrogatories. The serving of written interrogatories is a far simpler matter than the taking of a deposition. In addition, written interrogatories affect only the parties to the proceedings, while depositions generally involve non-parties. For these reasons the need for the presiding officer to retain firm control over discovery is not as great in the case of written interrogatories as it is in the case of depositions. Parties should therefore be able to serve written interrogatories on each other without applying to the presiding officer for permission to do so and prior to the holding of any prehearing conference. In many simple cases the answers to the interrogatories may supply the parties with sufficient information to make a prehearing conference unnecessary. However, written interrogatories may often require comprehensive and detailed responses which impose a real burden on the answering party. The prehearing conference is intended to provide a less onerous means for the parties to exchange information. The exchange of cases between the parties at the prehearing conference may supply much of the information sought by interrogatories. Furthermore, the presiding officer at the prehearing conference can arrange a mutual exchange, while the party answering interrogatories must disclose his case without the assurance of reciprocity.

Recommendation 4(a) recognizes these dangers and meets them by providing that a party upon whom written interrogatories have been served may postpone answering them by applying to the presiding officer to hold a prehearing conference for the mutual exchange of evidentiary exhibits and other information. The presiding officer should normally grant the application if he has not yet held at least one prehearing conference under Recommendation 1 to arrange the exchange between the parties of evidentiary exhibits and witness lists. Even if there has been such a prehearing conference, the presiding officer should hold additional ones if the parties are encountering difficulties in completing the exchange of information on their cases. The presiding officer should then conduct the prehearing conference to insure that the interrogating party obtains as much as possible of the requested information. Following the completion of the prehearing conference, the party served with the written interrogatories must respond to all appropriate questions whose answers have not been supplied at the prehearing conference. Of course, the presiding officer need not grant a party's application for a prehearing conference if he has already held one and the parties have already exchanged their cases. In these instances, the party served with interrogatories must answer them if the questions call for additional, relevant and unprivileged information.

Written interrogatories should not disrupt or unduly delay agency proceedings. A substantial body of judicial precedent has developed on the proper scope of questions and the handling of evasive answers. Agencies can use these precedents to make written interrogatories workable in their proceedings. Recommendation 4(a) also adopts a proposed change in Rule 33 of the Federal Rules of Civil Procedure intended to simplify the federal practice on written interrogatories. Under the existing practice, a party objecting to an interrogatory directed to him must burden the trial court with a motion for the court to hear his objection. Under the proposed revision of Rule 33, the interrogating party must go to court for an order to compel an answer.

This change should encourage parties to settle their disagreements and to resort less frequently to the courts for doing so. Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery*, (Nov. 1967) 61-64.

Written Interrogatories Directed to the Agency. Recommendation 4(a) specifically provides that a party to a proceeding may direct written interrogatories to the agency. Normally the agency through its staff is a party to adjudicatory proceedings; in that capacity it should stand on the same footing as any other party. Recommendation 4(b) handles the mechanics of written interrogatories directed to the agency; it requires each agency to designate an agency official (e.g., the Executive Secretary of the agency, a Bureau Chief, or the trial attorney himself) on whom parties to a proceeding may serve written interrogatories directed to the agency. That person has the responsibility for insuring that the appropriate agency personnel with knowledge of the facts answer and sign the interrogatories on behalf of the agency. FCC Rule 1.311(b)(2) presently contains a provision of this type: "Interrogatories shall be served on the appropriate Bureau Chief (see § 1.21(b)). They will be answered and signed by those personnel with knowledge of the facts. The answers will be served by the Secretary of the Commission upon parties to the proceeding." 47 C.F.R. 1.311(b)(2) (1969). The answers to the interrogatories bind the agency in the same manner as the attorney representing the agency at the hearing binds it by signing pleadings, stipulating facts, and speaking in an open hearing. Recommendation 4(b) specifically recognizes this important role of the agency attorney by authorizing him to make and sign objections to interrogatories. The agency attorney may, of course, also pass on the accuracy and appropriateness of the answers to interrogatories furnished by other agency employees.

In the great majority of cases the information sought by written interrogatories directed to the agency can be supplied by the agency staff without any assistance from or reference to the agency head or members. The agency employee with knowledge of the facts simply answers the interrogatories on behalf of the agency. Only in unusual cases should an agency head or members, whose primary function is to judge, have available relevant, unprivileged information not known to any other agency employee. The last sentence in Recommendation 4(b) deals with this situation. The presiding officer may not order an agency head or member to answer an interrogatory but the party seeking the answer must obtain a special order from the agency itself. That order must be based on a finding that the interrogatory seeks significant, unprivileged information not discoverable by alternative means. This procedure safeguards the integrity of the judging function while allowing discovery from an agency head or member in cases of real need. Recommendation 2(6) contains an analogous procedure for deposing agency employees. That recommendation, which does not contemplate the deposing of agency heads, permits the presiding officer to enter the special order subject to an interlocutory appeal. Recommendation 4(b), on the other hand, provides for discovery from the agency heads. It is inappropriate to authorize the presiding officer to order agency heads to supply discovery.

Agencies have generally opposed subjecting their staffs to written interrogatories. The bases for the opposition to this form of discovery are the burden which interrogatories would impose on the agency staff and each agency's desire to protect from disclosure its investigatory and decisional processes. The latter objection really pertains only to the scope of this form of discovery and not to its existence. To that extent the objection is valid. Agency personnel should not be questioned concerning their thought processes, their subjective impressions, or their interoffice discussions and recommendations. To require disclosure of these matters would subvert the freedom of deliberation essential to fair administration and prevent open, frank discussions between subordinate and chief concerning administrative action. *Kaiser Aluminum & Chemical Corp.* v. *U.S.*, 157 F.Supp. 939, 945–946 (Ct. of Cl. 1958) (Justice Reed). Such matters should be treated as privileged in order to protect the agency's decisional processes. This privilege, however, should not prevent the questioning of agency personnel concerning their factual knowledge and the existence and location of documents and other relevant evidence. FCC Rule 1.311(b) recognizes this distinction when it specifies the scope of the written interrogatories which may be directed to the agency:

> (3) . . . Commission personnel may be questioned by written interrogatories regarding the existence, general nature and description, custody, condition and location of Commission records, but may not be questioned concerning their contents unless the records are available (or are made available) for inspection under §§ 0.451–0.461. See § 0.451(b)(4) of this chapter.
>
> (4) Subject to subparagraphs (1)–(3) of this paragraph, Commission personnel may be questioned generally by written interrogatories regard-

> ing the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge.
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> 47 C.F.R. 1.311(b) (1969).

The Broadcasting Bureau of the FCC reports that only in a limited number of instances have written interrogatories been directed to it during the first year or so of this Rule's operation. Certainly no great burden has been placed on the agency, and private parties have a potentially useful discovery device available to them, particularly for identifying the specific documents which are in the agency's files and which the agency may then be ordered to produce.

Recommendation 4 thus allows private parties in agency proceedings to direct written interrogatories to the agency. While the recommendation does not specify in detail the appropriate scope of the interrogatories, it does refer to agency personnel with "knowledge of the facts." An agency remains free under this recommendation to follow the example of FCC Rule 1.311(b) and to limit more specifically the appropriate scope of written interrogatories. Certainly those limitations are implicit in Recommendation 4 itself, because normally a party's work product and decisional processes are protected from discovery under *Hickman* v. *Taylor*, 329 U.S. 495 (1947). This protection is not limited to the agency but extends to private parties as well.

DISCOVERY RECOMMENDATION 5. REQUESTS FOR ADMISSIONS

(a) *Availability*

A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objectives to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

Discovery Recommendation 5. Three agencies have adopted substantially verbatim Rule 36 of the Federal Rules of Civil Procedure on the Admission of Facts and of Genuineness of Documents by parties to a proceeding. See Rule 3.31 of the FTC, 16 C.F.R. 3.31 (1969); Rule 1.246 of the FCC, 47 C.F.R. 1.246 (1969); and Rule 12(h) of the FMC, 46 C.F.R. 502.208 (1969). Recommendation 5 provides that a rule of this type should be part of the discovery machinery of every agency. The FTC experience, however, shows that such a rule will play a modest role. In its eight years of operation, FTC Rule 3.31 has not been used very heavily because the parties find it more advantageous to stipulate to facts and to the admissibility of evidence at a prehearing conference where the examiner presides over a mutual give and take. A written request for admissions is a more cumbersome device and lawyers have a way of drafting technical, unhelpful responses. Nevertheless, a rule on admissions is a standard discovery provision which should prove useful in many simple cases where no prehearing conference is necessary and in more complex cases where it is wasteful to call another prehearing conference every time a party is interested in obtaining an admission.

Recommendation 5(a) provides, in conformity with Rule 36 of the Federal Rules, that an admission shall be only "for purposes of the pending proceeding." Recommendation 5(b) contains special provisions on requests directed to the agency similar to those in Recommendation 4(b) on interrogatories directed to the agency.

DISCOVERY RECOMMENDATION 6. PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

(a) *From Non-Parties*

A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties*

A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*

For purposes of Recommendation 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding."

Introduction. Agencies normally have broad investigatory powers to gather by compulsory process or voluntary cooperation all the documents and other tangible evidence they need. This investigatory stage usually precedes the commencement of formal adjudicatory proceedings, and the agency has therefore generally completed the majority of its discovery before the formal proceeding begins. Recent judicial decisions have broadly sanctioned the use by an agency of its compulsory process to further investigations of this type conducted by the agency staff. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *Hannah* v. *Larche*, 363 U.S. 420, 442–451 (1960). Private parties to agency adjudications have no comparable investigatory machinery available to them for the obtaining of such information and must rely on discovery if they are to redress the balance prior to the hearing itself. At the discovery stage of the proceeding the respondent or other private party should therefore be able to inspect and obtain copies of all relevant, non-privileged documents and tangible things Such documents and things may either be in the possession of other parties to the proceeding (including the agency itself) or of non-parties.

The Federal Rules of Civil Procedure distinguish between the discovery of documents and tangible things from non-parties and similar discovery from other parties to the proceeding. A party may obtain the production of documents and tangible things in the possession of a non-party by serving a notice to take his deposition and then obtaining a subpoena duces tecum under Rule 45(d)(1) from the clerk of the district court in the district in which the deposition is to be taken The subpoena must simply "designate" the documents and things whose production is sought; no showing of good cause is required. 4 Moore, *Federal Practice,* par. 26.10[1] (2d ed. 1969). Discovery of documents and tangible things from another party is more difficult. The present Rule 34 requires that the party seeking discovery obtain a court order for the production of documents and tangible things from another party. In addition, the moving party must show "good cause" for the production order. A party may circumvent Rule 34's requirement of a court order by serving another party under Rule 45(d)(1) with a subpoena for taking his deposition which directs him to produce designated documents and things at the deposition. Courts have generally held, however, that a party seeking production in this fashion cannot evade Rule 34's additional requirement that he show good cause to obtain the production of documents and tangible things from another party. Good cause is still required to enforce the subpoena. 4 Moore, *Federal Practice,* par. 34.02 [2.–2] (2d ed. 1969).[14]

Recommendation 6 adopts in modified form this dichotomy in the Federal Rules of Civil Procedure between the discovery of documents and tangible things from non-parties and from parties. Recommendation 6(a) covers the former situation and allows a party to the proceeding to obtain a subpoena duces tecum directed to a non-party which is returnable at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer. The latter situation of discovery between parties is covered by Recommendation 6(b). That recommendation resembles the present Rule 34 of the Federal Rules and authorizes the presiding officer to order a party to produce at a prehearing conference or at any specific time and place designated documents and tangible things. These two provisions thus recognize that different procedures are suitable for discovery of documents and tangible things from non-parties than are suitable for similar discovery between parties. Recommendation 6(c) further recognizes that practical considerations dictate treating an agency that conducts an adjudicatory proceeding as a party to that proceeding regardless of whether the agency staff formally participates as a party.

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[14] The Committee on Practice and Procedure of the Judicial Conference of the United States has proposed a major revision of Rule 34. The proposed new rule functions extrajudicially and eliminates the requirement of "good cause" except for the discovery of trial preparation materials and of the opinions of experts. The party seeking production no longer must either first obtain a court order or take his opponent's deposition and no longer must show good cause unless he is seeking discovery under Rule 26(b) of trial preparation materials or of the opinions of experts. The Committee found that the good cause requirement was an erratic and uncertain protection to parties from whom production was sought and that through common law office practice Rule 34 was in fact operating extrajudicially already. The Committee approved this practice and indicated that the general provision on protective orders would adequately protect a party subject to abusive production requests. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery* 69–71 (Nov. 1967).

These differences in procedure between Recommendation 6(a) and 6(b) should not obscure the basic point that the advantages of the prehearing discovery of documents and tangible things are similar in both situations. The parties are able to obtain prior to the hearing complete information on the relevant facts. This helps them to prepare their cases and encourages settlement and stipulations. Private parties to adjudicatory proceedings are also able to rectify the imbalance created by the agency's broad investigatory powers. This form of prehearing discovery should also serve to expedite the hearing itself. Documents and tangible things that are relevant and unprivileged are admissible in evidence at the hearing and become available to all parties at that time. A party may secure their production at the hearing by serving subpoenas duces tecum on the person (party or non-party) who has possession or control of them. Confusion and delay often result when such a party is confronted at the hearing with a mass of unfamiliar documents produced by his opponent or by a witness whom he has subpoenaed. Much of the subpoenaed material may not even be put into the record. See the testimony of Admiral Harllee, former Chairman of the Federal Maritime Commission, before the House Subcommittee on Merchant Marine, in support of Public Law 90–177 (authorizing the Commission to enact discovery rules in complaint cases), August 16, 1967, p. 60 of the Hearings. This problem can be avoided if all relevant documents are available to all the parties prior to the hearing. Informal exchanges between lawyers already accomplish this purpose in many cases; Recommendation 6 simply insures that this will occur.

Both Recommendations 6(a) and 6(b) cover the production of "documents and tangible things." Rule 34 of the Federal Rules of Civil Procedure contains a more extensive catalogue of items subject to production. That rule provides for the production of "any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things." Similarly, Rule 45(b) provides that a subpoena duces tecum may require a person to produce "the books, papers, documents, or tangible things designated therein." These recommendations employ the phrase "documents and tangible things" because it is both simple and comprehensive. There is no intent to adopt a narrower coverage for Recommendations 6(a) and 6(b) than that provided for in the Federal Rules or to prevent individual agencies from itemizing in their own rules specific types of documents and things. A complicating factor which may confront many agencies on this point is that the statute authorizing the agency to issue subpoenas may only speak in terms of subpoenas for the production of "documentary evidence." See § 9 of Federal Trade Commission Act, 15 U.S.C. 49. Whether this type of statute limits the power of an agency to issue subpoenas for tangible evidence is unclear. The FTC Rules of Practice for Adjudicative Proceedings authorize subpoenas for the production of "specified documents, papers, books, or other *physical exhibits*," 16 C.F.R. 334 (b)(1) (1969) (emphasis added). The SEC has statutory authority to issue subpoenas for the production of "books, papers or other documents," 15 U.S.C. 77(s)(b), while its rules authorize subpoenas "requiring the production of documentary or *other tangible evidence*," 17 C.F.R. 201.14(b) (1969) (emphasis added). Recommendations 6(a) and 6(b) do not attempt to resolve this theoretical problem of the type of evidence which is subject to the compulsory process of an agency. Rather, they select the comprehensive phrase "documents and tangible things not privileged, which constitute or contain relevant evidence" as best describing the material which a party should be able to obtain through discovery.

Discovery Recommendation 6(a). Recommendation 6(a) permits a party to the proceeding to obtain subpoenas duces tecum to discover relevant unprivileged documents and tangible things from non-parties. The principal effect of the recommendation is to make the subpoena duces tecum available as a discovery device. The practice of some agencies is to make subpoenas duces tecum returnable only at the hearing itself. A number of agency rules specifically state that subpoenas are available for the attendance of a witness or the production of documentary evidence at a "hearing." See the CAB rule, 14 C.F.R. 302.19(a) (1969) and the Department of Agriculture rules for disciplinary proceedings, 7 C.F.R. 47.34 (1969) and 9 C.F.R. 202.13 (1969). Only a minority of agencies specify in their rules that subpoenas duces tecum may be returnable at the prehearing stage of the proceeding. See the FCC rule, 47 C.F.R. 1.333(e) (1969) (at the taking of a deposition); the FTC rule, 16 C.F.R. 3.31(b)(1) (1969) (at a prehearing conference and at the taking of a deposition); and the rule of the Bureau of Land Management of the Department of the Interior, 43 C.F.R. 1850.0-7(a) (1969) (at any hearing and at the taking of a deposition).[15]

Recommendation 6(a) requires agency rules to specify that a subpoena duces tecum directed to a non-party may be returnable at a prehearing conference, at the taking of the non-party's deposition, or at some other specific time and place (i.e. the hearing examiner's office) designated by the issuing officer. This change permits parties to obtain relevant, unprivileged documents and tangible things at an early stage in the proceeding and to use them in preparation for the hearing. If subpoenas are only returnable at the hearing, a party may unfortunately be surprised when confronted for the first time at the hearing with documents produced by a non-party in response to a subpoena. Under Recommendation 6(a) a party can avoid this surprise by securing a subpoena returnable at a prehearing conference or at the taking of a deposition. The return of subpoenaed documents at a prehearing conference seems particularly desirable because the parties can arrange at that time for the making of copies and for stipulations on genuineness. This use of the prehearing conference has worked well at the FTC and is a sensible way to handle instances where a party wants to obtain documents for discovery purposes but is not interested in deposing their possessor. In such cases it is less time consuming and cumbersome to arrange for the production of the documents at a prehearing conference than to schedule a deposition. Kintner, Recent Changes in Federal Trade Commission Discovery Practice, 37 *Antitrust Law Journal* 238, 241–242 (1968). If there is no formal prehearing conference, the return of subpoenaed documents may be just as conveniently arranged at the presiding officer's office. Of course, nothing in Recommendation 6(a) prevents the informal return of subpoenaed documents through law offices.

Discovery of documents and tangible things from non-parties should not pose serious difficulties in most agency adjudications. Only in a limited number of instances will a party to a proceeding want to obtain large quantities of documents from non-parties, and normally non-parties will not object to producing the documents at the discovery stage rather than at the hearing itself. Restraint of trade cases at the FTC are a major exception to these generalizations. Respondents in these cases often seek large quantities of documents on sales and market shares from their competitors, who are generally not parties to the proceeding. The competitors then apply for protective orders to protect what they believe is confidential business information. Serious delays may result, but fairness still requires that respondents receive adequate discovery. The presiding officer may alleviate the problem if at the prehearing conference he successfully narrows the issues or obtains stipulations so as to make much of the requested discovery unnecessary. A number of FTC examiners propose in addition that the respondent's discovery be postponed to an interval or adjournment in the hearing between the presentation of the agency's case and that of the respondent. These examiners believe, and they have some experience with concrete cases to back them up, that the respondent's need for discovery will be much less at this point because he will know what he must defend against. Practitioners are generally unhappy about this proposed return to a trial by intervals because they maintain that you cannot separate so readily the agency's case from the respondent's defense. The respondent needs full discovery in order to cross-examine the agency's witnesses and challenge its documentary evidence. Furthermore, under Recommendation 1, the agency should normally disclose its affirmative case at the prehearing conference; this disclosure should enable the respondent and the presiding officer to determine at that point what further discovery is necessary. On balance, the practitioners have the stronger case. Accordingly, Recommendation 6(a) does not provide for postponing discovery of documents and tangible things from non-parties until an interval in the hearing following the presentation of the agency's case.

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[15] The CAB rule on prehearing conferences authorizes the examiner to compel a *party* to produce documents "prior to hearing by subpoena issued in accordance with the provisions of § 302.19 as though at a hearing." 14 C.F.R. 302.23(a) (1969). The statutory authority for the Department of the Interior's Rule has recently been questioned. The statute does not even refer to subpoenas for the production of documentary evidence. See note 4a at page 627.

Availability to Private Parties of Subpoenas Duces Tecum. Recommendation 6(a) provides that private parties should be able to obtain subpoenas duces tecum to enforce discovery requests directed to non-parties. This aspect of the recommendation raises the question of the appropriate procedure for making available to private parties the compulsory process of the agency. The prior Administrative Conference considered this problem in its Recommendation 13, S. Doc. No. 24, 88th Cong., 1st Sess. 207 (1963). Further consideration is necessary at this time.

The Administrative Procedure Act has two provisions on the issuance of subpoenas by administrative agencies. Section 6(d), 5 U.S.C. § 555(d), generally provides for the issuance of subpoenas in agency proceedings: "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." Section 7(c)(2), 5 U.S.C. 556(c)(2), on the other hand, specifies the power of the presiding officer in a rulemaking or adjudicatory proceeding subject to sections 7 and 8 to issue subpoenas. The presiding officer may, "[s]ubject to published rules of the agency and within its powers," issue subpoenas "authorized by law." Neither of these two provisions expands the power of an agency to issue subpoenas; both of the provisions require that the issuance of subpoenas be otherwise "authorized by law." Congress must therefore delegate to individual agencies the power to issue subpoenas or other compulsory process. Once Congress does authorize an agency to issue subpoenas, section 7(c)(2) of the Administrative Procedure Act automatically vests in the presiding officer in a section 7 and 8 proceeding the subpoena power to the extent that such power has been given to the agency itself. *Attorney General's Manual on the Administrative Procedure Act* 74 (1947). Section 6(d) also comes into play once Congress authorizes the agency to issue subpoenas; its purpose is to assure that private parties to agency proceedings have the same access to subpoenas as do the representatives of the agency. *Senate Report on the Administrative Procedure Act*, Sen. Doc. No. 248, 79th Cong., 2nd Sess. 206, 265(1946).[16]

Agencies which have the subpoena power have adopted one of three basic approaches on the availability of subpoenas to private parties to adjudicatory proceedings. The predominant approach is to require the party seeking the subpoena to show the "general relevance and reasonable scope of the evidence sought." Section 6(d) of the Administrative Procedure Act expressly authorizes agencies to adopt rules of procedure requiring such a showing. Agencies adopting this approach include the CAB, 14 C.F.R. 302.19(c) (1969); the FCC, 47 C.F.R. 1.333(c) (1969); the FTC, 16 C.F.R. 3.34(b)(1) (1969); the FPC, 18 C.F.R. 1.23(a) (1969); the ICC, 49 C.F.R. 1100.56(a) (1969); the Department of Agriculture, 7 C.F.R. 47.34(a) (1969) and 9 C.F.R 202.13(a) (1969); and the National Safety Transportation Board in the Department of Transportation, 14 C.F.R. 421.12 (1969). In the case of the CAB and the FTC, the required showing of general ? relevance and reasonable scope only applies to subpoenas ad testificandum.

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[16] Section 6(d) does not govern the issuance by the agency of purely investigatory subpoenas in support of an agency investigation conducted independently of any formal adjudicatory or rulemaking proceeding. There are no "parties" to an agency investigation of this type. See the Administrative Procedure Act's definitions of "party" and "proceeding" in sections 2(3) and 2(12), 5 U.S.C. 551(2) and 551(12). Private persons are therefore unable to obtain administrative subpoenas under section 6(d) unless they become a "party" to an adjudicatory or other proceeding. It should be remembered, however, that the ICC, FMC and a number of other agencies conduct proceedings referred to as "investigations" that are in reality formal adjudicatory proceedings.

A second approach, adopted only by a small minority of agencies, is to issue subpoenas to parties upon request. Questions of relevance and reasonable scope are only considered when the subpoenaed person moves to quash the subpoena. The NLRB is the only major regulatory agency which has explicitly adopted this policy. The issuance of a subpoena to a party is mandatory under NLRB Rule 102.31, 29 C.F.R. 102.31 (1969). See *General Electric, Inc.* v. *NLRB*, 341 F.2d 367, 375 n. 15 (9th Cir. 1965). The NLRB rule further provides that the agency shall revoke the subpoena upon the petition of the subpoenaed person if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceeding or the subpoena does not describe with sufficient particularity the evidenc whose production is required, or if for any other reason sufficien in law the subpoena is otherwise invalid." The rules of the Bureau of Land Management of the Department of the Interior 43 C.F.R. 1850.0–7 (1969), and of the Coast Guard in the Department of Transportation, 46 C.F.R. 137.15–10 (1969), als do not require a party to show the general relevance and reasonable scope of the evidence sought to obtain a subpoena, but ther seems to be no explicit holding that this omission makes the issuance of subpoenas mandatory upon the request of a party.

The SEC and FMC have adopted a third, middle approach o the issuance of subpoenas to parties to adjudicatory proceeding The SEC rule on subpoenas provides:

> "(b) Subpenas; motions to quash or modify; service. (1) Issuance subpenas ad testificandum and subpenas duces tecum. The heari officer, or in the event he is unavailable, any member of the Commissi or any other officer designated by the Commission for the purpose, connection with any hearing ordered by the Commission, shall issue subpenas requiring the attendance and testimony of witnesses and subpen requiring the production of documentary or other tangible evidence any designated place of hearing upon request therefor by a party; provided, however, that, where it appears to the person request to issue the subpena that the subpena sought may be unreasonable, pressive, excessive in scope, or unduly burdensome, he may in his disc tion, as a condition precedent to the issuance of the subpena, require t person seeking the subpena to show the general relevance and reasona scope of their testimony or other evidence sought. In the event the pers

requested to issue the subpena shall after consideration of all the circumstances determine that the subpena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, where he can do so without undue inconvenience to the participants in the proceeding, the person requested to issue the subpena may inquire of the other participants whether they will concede the facts sought to be proved; but in this connection, except with permission of the person seeking the subpena, he shall not disclose the identity of the person sought to be subpenaed. A person whose request for a subpena has been denied or modified may not request any other Commission official to issue the subpena; but he may appeal to the Commission from the denial or modification." 17 C.F.R. 201.14(b)(1) (1969). The analogous rule of the FMC is 46 C.F.R. 502.131 (1969).

The prior Administrative Conference recommended in 1962 that agencies adopt the second approach and issue subpoenas upon request to parties to adjudicatory proceedings. Recommendation No. 13, S. Doc. No. 24, 88th Cong., 1st Sess. 207, 217–218 (1963). This aspect of Recommendation No. 13 is questionable. The committee report in support of the recommendation relies on the NLRB practice and on a lengthy quotation from Robert Benjamin which defends the issuance of administrative subpoenas to a party upon request on the grounds that judicial subpoenas are available on request and that it is unfair to require a party to disclose to his adversaries the evidence he hopes to obtain by subpoena. *Id.* at 218. This reasoning is unpersuasive. Administrative process, unlike most judicial process, runs nationwide and there is thus a significant danger of abusive, unreasonable requests for subpoenas. Furthermore, agency rules on the issuance of subpoenas either explicitly provide for ex-parte applications for subpoenas or contain no requirement that the party seeking a subpoena give notice to the other parties. Thus, any disclosure which a party must make to show the general relevance and reasonable scope of the evidence sought by subpoena is made only to the impartial presiding officer.

Recommendation No. 13 thus seems unsound when it insists that agencies dispense with a showing of general relevance and reasonable scope as a prerequisite for obtaining a subpoena. Agencies should be allowed to control their own process by requiring such a showing in conformity with section 6(d) of the Administrative Procedure Act. That section allows the agency to prevent the issuance of improvident subpoenas but prevents it from "requiring a detailed, unnecessary, and burdensome showing of evidence which might fall into the hands of the party's adversaries or investigators and prosecutors (who in any event should not have access to such papers directly or indirectly)." *Senate Report on the Administrative Procedure Act, id.* at p. 265. Perhaps the best approach is the middle one adopted by the SEC and FMC. That approach does not burden the party applying for subpoenas with making a showing of general relevance and reasonable scope in every case. Only when the presiding officer finds the request unreasonable or oppressive on its face must the applicant make the required showing to obtain the subpoena. Judicial decisions have recognized that even in the absence of a procedural rule requiring a showing of general relevance and reasonable scope agencies have an inherent power to deny requests for subpoenas that seek irrelevant material or are unreasonable in scope. In *San Francisco Mining Exchange* v. *SEC,* 378 F. 2d 162 (9th Cir. 1967), the court upheld the SEC's refusal to issue subpoenas duces tecum and ad testificandum directed to Commission members on the ground that the evidence sought was irrelevant, even though the former SEC rule in effect at the time of the refusal appeared to make the issuance of subpoenas mandatory on request and did not require any showing of the general relevance and reasonable scope of the evidence sought. See also *Independent Directory Corp.* v. *FTC,* 188 F.2d 468, 471 (2d Cir. 1951), where the court held that the FTC is not required to issue subpoenas duces tecum upon request and then entertain a motion to quash or modify but has quasi-judicial discretion to deny an application "which is so broad and sweeping as to be unreasonable."

This background on subpoenas is necessary to understand the effect of Recommendation 6(a). The purpose of Recommendation 6(a) is to further administrative discovery. The recommendation as drafted is not intended to take a position on whether an agency should initially require a party seeking a subpoena to show the general relevance and reasonable scope of the evidence sought. The recommendation is solely designed to encourage discovery in administrative adjudications and is not directly concerned with whether an agency controls the issuance of its process by requiring, prior to the issuance of a subpoena, a showing of the general relevance and reasonable scope of the evidence sought or by deferring such questions to a ruling on a motion to quash.

Discovery Recommendation 6(b). Recommendation 6(b) provides for the discovery between parties of documents and tangible things. The recommendation covers three distinct situations

(1) one private party may seek such discovery from another private party; (2) the agency staff participating in the proceeding as a party may seek such discovery from a private party; and (3) a private party may seek such discovery from the agency. In all three situations the party seeking discovery should apply to the presiding officer for a production order. The application should designate the documents and things whose production is requested. Copies of the application should be served on the other party or parties to the proceeding, who would be given an opportunity to notify the presiding officer of their objections to the application. The presiding officer should then order the production of the designated documents and tangible things at a prehearing conference or at some other specific time and place unless he finds that there is not good cause for doing so. The effect of this last provision is to retain the requirement in the present Rule 34 of the Federal Rules of Civil Procedure that there be "good cause" for the production of the designated documents and tangible things but to shift the burden of proof on the issue of good cause from the applicant to the party or parties opposing production. Thus, the party seeking discovery need not detail good cause in his application for a production order.

The procedure which a party must follow to obtain a production order is similar to the procedure in Recommendation 2(2)-(5) for obtaining an order to take a deposition. These requirements are intended to insure that the presiding officer retains firm control over the discovery process. In a number of ways this procedure contrasts sharply with Recommendation 6(a), which does not require any specific procedure for obtaining for discovery purposes a subpoena duces tecum directed to a non-party but permits agencies to structure their own procedures within the limits imposed by the Administrative Procedure Act. An application for a subpoena duces tecum may be made ex-parte, and good cause is not required. An agency may require prior to the issuance of the subpoena no more than a showing of the general relevance and reasonable scope of the evidence sought.

These contrasts between Recommendations 6(a) and 6(b) are not as significant as they might seem at first glance. For a subpoena to be returnable at a prehearing conference or at the taking of a non-party's deposition, the presiding officer must first hold a prehearing conference under Recommendation 1 or order the taking of the non-party's deposition under Recommendation 2. Neither of these events occur automatically. The presiding officer should only hold a prehearing conference if he feels there is good reason to do so and should control the taking of depositions by denying an application to take a non-party's deposition if he finds that the applicant does not have good cause for doing so. The presiding or other issuing officer also has the authority to specify any other time and place where documents subpoenaed from a non-party may be returnable prior to the hearing. Thus the presiding officer retains considerable control over the prehearing discovery of documents and tangible things from non-parties. The degree of control is simply somewhat less than that exercised by the presiding officer over discovery between parties. The FCC's discovery rules distinguish in similar fashion between subpoenas duces tecum and production orders. A party may obtain a subpoena returnable at the taking of a deposition by specifying the particular documents desired and the facts expected to be proved thereby, but must give notice to the other parties and have good cause in order to obtain a production order. 47 C.F.R. 1.33(e) and 1.325 (1969).

An agency can prevent parties from circumventing these requirements for obtaining a production order by insisting that parties seeking the discovery of documents and tangible things from other parties do so by the route of applying for a production order rather than by the subpoena route. Recommendation 6(a) permits agencies to so provide in their rules because it only requires agencies to issue discovery subpoenas (i.e., subpoenas returnable at a prehearing conference or at a deposition) enforceable against non-parties. A party seeking discovery of documents and tangible things from another party must therefore apply for a production order under Recommendation 6(b). Of course, agency rules should authorize the presiding officer to issue subpoenas duces tecum and ad testificandum requiring both parties and non-parties to appear and give evidence at the hearing itself. These subpoenas do not normally serve a discovery function.

The differences between Recommendations 6(a) and 6(b) should on the whole make it somewhat easier for a party to obtain a subpoena duces tecum directed to a non-party than to obtain a production order directed to another party. This divergent treatment recognizes that the three situations covered by Recommendation 6(b) pose significantly different problems than does the discovery of documents and tangible things from non-parties covered by Recommendation 6(a). Where discovery between parties is involved, the presiding officer must retain firmer control over the discovery process to prevent delays and other abuses. The quantity of material which a party to the proceeding seeks from a fellow party is likely to be greater than that sought from individual non-parties. Claims that the material sought deserves "work product" protection are also likely to be more frequent when discovery is sought from another party. The presiding officer in these situations should protect parties from abusive production requests and resolve all questions of privilege. Even more important, the parties to the proceeding should participate with the presiding officer in a prehearing procedure designed for the exchange of information. Recommendation 1 authorizes the presiding officer to hold prehearing conferences and to direct a mutual exchange between the parties of documents and other evidentiary exhibits. The presiding officer should insure that production applications do not interfere with the smooth functioning of the prehearing procedure and delay the course of the proceedings. In many simple cases mutual applications for production orders and the resultant exchange of documents between the parties may obviate the need for any formal prehearing conference. However, in more complex cases, myriad requests for the production of documents may cause confusion and delay, especially if the parties have not yet attended a prehearing conference. The production order requested by one party may direct another party to disclose his evidentiary case prior to any such disclosure by the applicant. In such cases the presiding officer may well determine that there is no "good cause" for ordering the one-sided disclosure of a party's case. The presiding officer should instead take control of the proceeding and schedule a prehearing conference where the parties will conduct a mutual exchange of their affirmative evidentiary cases. Of course, a party may wish to obtain discovery of documents and other tangible things in addition to those which another party plans to make part of its evidentiary case. At the close of the prehearing conference the presiding officer can determine what further discovery of this type is necessary and order the production of the documents and tangible things in question. The prehearing conference should thus remain the most important discovery device in major agency adjudication.

A pattern similar to that described above has developed in complaint and investigation proceedings at the FMC. These proceedings often involve large numbers of private parties (e.g., individual carriers, conferences of carriers, shippers and governmental agencies) and masses of documentary evidence. The Commission's new discovery rules contain a provision for production orders closely modeled on Rule 34 of the Federal Rules of Civil Procedure. 46 C.F.R. 502.207 (1969). The examiners do not follow any rigid pattern in applying this rule but they generally postpone ordering a party to produce documents until there has been a prehearing conference. Normally the initial prehearing conference takes place at an early stage in the proceeding. At the conference the parties are often able, with the guidance of the presiding officer to arrange for the mutual production of relevant material. Discovery then proceeds on a voluntary basis. Only rarely is it necessary for the presiding officer to compel production through a formal order. The Commission's Hearing Counsel, who is a party to all investigation proceedings, is often the chief beneficiary of this expanded discovery between parties. He uses the examiner's authority to order the production of relevant, unprivileged documents to gain access to the records of the other parties to the proceeding.

One final problem which remains is the enforcement of production orders. The rules of the FMC provide for the judicial enforcement of a production order analogous to the judicial enforcement of a subpoena. 46 C.F.R. 502.210(b) (1969). The rules of the FCC, on the other hand, provide for the issuance of a separate subpoena duces tecum to enforce a production order. 47 C.F.R. 1.333(f) (1969). Other possibilities for enforcement include the drawing of adverse inferences against the party refusing production. Willful refusal to provide discovery may also reflect on a party's fitness for a license or other agency action. See the FCC Report on its new Discovery Rules, 11RR 2d 1691, 1696 (1968). Recommendation 6(b) does not deal with this problem but leaves it for the respective agencies to resolve.

Discovery Recommendation 6(c). In cases where a private party is seeking discovery of documents and tangible things from the agency, Recommendation 6(c) treats the agency conducting an adjudicatory proceeding as a party to that proceeding whether or not the agency staff formally participates as a party. In the majority of adjudicatory proceedings the appropriate division of the agency does so participate. This is particularly true in disciplinary and enforcement cases. However, agencies often adjudicate controversies between private parties where the agency staff takes no position and does not intervene as a party. Examples of this latter type of proceeding include shippers' suits for reparations and comparative licensing hearings where several applicants seek a single license. Even in these proceedings the agency staff may participate as a party if it is interested in setting future rates or in taking a position on a particular issue. Private parties to such proceedings need to obtain effective discovery of documents and tangible things from the agency whether or not the agency staff chooses to become a party to the proceeding. Agencies are adjudicating cases in their areas of regulatory responsibility, and their files often contain documents and other information relevant to the proceedings and useful to one or more of the private parties. A party's ability to obtain production of documents and tangible things from the agency's files should not depend on the fortuitous circumstance of whether the agency staff joins the proceeding as a party. On the other hand, an agency adjudicating a controversy should never be treated as a non-party from whom a party can obtain discovery of documents and things under Recommendation 6(a) by simply obtaining a subpoena duces tecum. The presiding officer should retain control over the party's access to agency files when that party is seeking documents which are not routinely available to the public. Recommendation 6(c) resolves this problem by treating the agency as a party to all adjudications conducted by it and thus requiring a party seeking discovery to obtain a production order under Recommendation 6(b).

At least three agencies presently have discovery rules which permit parties to adjudicatory proceedings to obtain production of agency records which are not routinely available to the public. See FTC Rule 3.36, 16 C.F.R. 3.36 (1969); FCC Rules 1.325 and 0.461(e), 47 C.F.R 1.325 and 0.461(e) (1969); and FMC Rule 12(i), 46 C.F.R. 502.209 (1969). All of these rules seem to be drafted to apply to adjudicatory proceedings whether or not the agency staff joins the proceeding as a party. The rules generally coincide with the present Rule 34 of the Federal Rules of Civil Procedure in requiring that the party seeking production obtain an order from the presiding officer upon a showing of good cause.

Discovery Recommendations 6(b) and 6(c) and the Freedom of Information Act. Discovery of documents from agency files has been greatly enhanced by the Freedom of Information Act of 1966, 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. § 552. That Act, which took effect on July 4, 1967, requires agencies to publish certain informational materials in the Federal Register, to make publicly available six kinds of documents (opinions, orders, statements of policy, interpretations, staff manuals and instructions), to disclose the final votes of each agency member in every proceeding, and to make available to any person upon request identifiable agency records. This final requirement, which makes large quantities of agency records routinely available to the public, has the greatest potential for opening up agency files. However, the Act contains nine exemptions ranging in importance from geological and geophysical information concerning wells to investigatory files. Agency records falling within any one of the exempted categories are not subject to the disclosure and public information requirements of the Act.[17]

Agencies have taken considerable steps to implement the Freedom of Information Act and to foster a freer flow of administrative materials. Sky, Agency Implementation of the Freedom of Information Act, 20 *Ad. L. Rev.* 445 (1968). Agencies have adopted procedures whereby persons may obtain identifiable agency records upon request. However, the exact scope of a number of the statutory exemptions is unclear, and the government has naturally tended to interpret the exemptions broadly. Davis, The Information Act: A Preliminary Analysis, 34 *U. of Chi. L. Rev.* 761 (1967). The scope of the fourth exemption covering "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is particularly uncertain. The Attorney General has taken position that this provision exempts non-commercial and non-financial information which is privileged or received in confidence by the agency even though the plain words of the exemption seem to cover only trade secrets and information that is "commercial or financial." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 32 ff. (1967). Dictum in a recent district court decision has rejected the Attorney General's interpretation and limited the scope of the exemption to trade secrets and commercial or financial information. *Consum-*

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[17] The exemption section of the Act reads as follows:

This section does not apply to matters that are:

1. specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
2. related solely to the internal personnel rules and practices of an agency;
3. specifically exempted from disclosure by statute;
4. trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
6. personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
8. contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
9. geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b)

ers Union v. *Veterans Administration*, 301 F.Supp. 796 (S.D. N.Y. 1969). For contrary dictum see, *Barceloneta Shoe Corp.* v. *Compton*, 271 F.Supp. 591 (D.P.R. 1967). Professor Davis has suggested that a clarifying amendment is necessary to straighten out the tangle. Davis, *id.* at 811.

The passage of the Freedom of Information Act does not eliminate the need for these Discovery Recommendations to provide for the discovery of documents and tangible things in agency files by a private party to an adjudicatory proceeding. Strictly speaking, the Act has nothing to do with discovery in adjudicatory proceedings because it provides that the agency shall make promptly available upon the request of *any* person identifiable records which do not fall within one of the specific exemptions. The request must be made in accordance with published agency rules establishing provisions on time, place and fees. Normally the request is to be directed to the Secretary or other administrative official of the agency who has authority to rule on the request on behalf of the agency. If the request is refused, the person seeking the records may bring an action in the United States District Court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the person bringing suit. 5 U.S.C. 552(a)(3). Thus, a person does not have to be a party to an agency proceeding to take advantage of the Freedom of Information Act. A busy-body who has no interest in obtaining agency records other than satisfying his own curiosity stands on the same footing under the Act in obtaining access to agency files as does the respondent in an agency enforcement action. Certainly the respondent or other private party to an adjudicatory proceeding has a greater need to obtain agency records than does the casual inquirer. While the required agency implementation of the Freedom of Information Act permits respondents to obtain considerable discovery of relevant documents in agency files regardless of whether the agency adopts formal discovery rules, respondents and other private parties to agency adjudications should be able to obtain additional discovery of documents which fall within the statutory exemptions and which are thus not available to the public at large. Formal discovery rules based on Recommendation 6(b) are necessary if these private parties, who have the greatest need for access to agency records, are to have adequate discovery.

Once an agency adopts these Discovery Recommendations a party to an adjudicatory proceeding conducted by the agency has two means available for discovering documents in agency files. The party may proceed under the Freedom of Information Act or under the discovery rules. See, Adams, The Freedom of Information Act and Pretrial Discovery, 43 *Military L. Rev.* 1, 27–33 (1969). The latter course should be available to the party because of the broad and often uncertain scope of the more important exemptions in the Act. For instance, the seventh exemption covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552(b)(7). This exemption has been construed broadly to cover investigatory files related to the enforcement of all kinds of laws, including labor, securities and other regulatory laws as well as criminal laws. *Barceloneta Shoe Corp.* v. *Compton,* 271 F.Supp. 591 (D.P.R. 1967); *Clement Bros.* v. *NLRB,* 282 F.Supp. 540 (N.D. Ga. 1968). Investigatory files are the most likely location of the documents which respondents want the agency to produce. As discussed previously, not all documents in investigatory files constitute the protected "work product" of the agency involved. See pp. 42–44. While it may be sensible to restrict the general public's access to investigatory files in order to protect the confidentiality and smooth functioning of the investigation, the respondent has a stronger interest and must be able to obtain through discovery relevant, unprivileged documents and tangible things in investigatory files so that he can learn the basis for the case against him and prepare his defense. The statutory exemption for investigatory files itself recognizes that portions of those files may be made available "by law" to a party to an agency proceeding. Congress probably had the Jencks Act in mind when it mentioned investigatory files available "by law" to a party (see *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 38 (1967)) but surely an agency may go further and grant to individual parties access to investigatory files that are exempt from the public disclosure requirements of the Freedom of Information Act. The seventh exemption for investigatory files thus does not operate by itself to allow any discovery of agency records by parties to adjudicatory proceedings but leaves it to the various agencies to complement the Freedom of Information Act by adopting discovery rules.

In other situations fairness may require that an agency produce upon the request of a respondent or other private party to an adjudicatory proceeding records which it quite rightly wants to keep from the public at large. This is particularly true when third persons who supplied the agency with information have an interest in keeping the agency records confidential. The FTC, for instance, collects a great variety of economic data from businessmen which the businessmen do not want to fall into the hands of their competitors. Often this data becomes relevant to a restraint of trade or deceptive practices proceeding brought against one of those competitors. While the competitor-respondent is generally entitled to obtain discovery of that data under the FTC's Rules of Practice, the FTC has developed an elaborate system of protective orders to insure that the respondent does not disclose the confidential data or otherwise put it to his own advantage. Often discovery of the data is limited to respondent's outside counsel, who may not share it with the respondent and must return it at the end of the proceeding. For a thorough discussion of the FTC practice, see Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices, 36 *U. of Chi. L. Rev.* 113 (1968). The device of the protective orders allows the agency to provide the respondent with adequate discovery while protecting the interests of the third persons from whom the agency obtained the information. Such a balancing of competing interests is not possible if the agency must disclose the confidential data to the public at large. The Freedom of Information Act recognizes this and specifically exempts from its coverage "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Although this exemption is inexpertly drafted (see p. 76 of this Report), it should cover the great majority of economic and related data obtained in confidence by an agency. When an agency such as the FTC builds its case against a respondent on the basis of this data, fairness requires that the respondent obtain adequate discovery to assist him in preparing his defense. Since the respondent cannot obtain these documents under the Freedom of Information Act, the agency must provide in its rules, as has the FTC, for discovery by the respondent of relevant, unprivileged documents in its files.

Privileged Documents in Agency Files. Recommendation 6(b), like all the other recommendations, only provides for the discovery of relevant, unprivileged information and material. The agency may therefore raise any recognized claim of privilege in response to a production request. Recommendation 6(b) does not attempt to define the law of privilege but leaves it to the presiding officer (and to the courts on judicial review) to determine what agency records are privileged and thus not subject to discovery. Applicable privileges would include the attorney-client privilege, the informer's privilege, the protection accorded "work product," the privilege for trade secrets and comparable confidential data, and the Executive privilege to withhold military and diplomatic secrets and other information whose disclosure would be detrimental to the public interest. See, in general, Carrow, Governmental Nondisclosure in Judicial Proceedings, 107 *U. of Pa. L. Rev.* 166 (1958); McCormick, *Evidence,* ch. 15 (1954). The scope of these privileges, although by no means clear, must be left to a case-by-case determination. The government's claim of privilege must not be accepted unquestionably, but in each case the presiding officer and reviewing court must scrutinize the claim to determine its validity. *United States* v. *Reynolds,* 345 U.S. 1 (1953) (military secrets); *Roviaro* v. *United States,* 353 U.S. 53 (1957) (informer's privilege). Furthermore, most privileges are not absolute, and the presiding officer and reviewing court must in each case balance competing interests in reaching a decision on privilege. The Supreme Court adopted this balancing approach in determining whether the government in a criminal case must disclose the identity of an informer:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro* v. *United States,* 353 U.S. 53, 62 (1957)

A similar balancing of the need to keep the informer's identity secret with the private party's need for disclosure is also necessary in civil and administrative proceedings where the government claims the informer's privilege. *Westinghouse Electric Corp* v. *City of Burlington, Vermont,* 351 F.2d 762, 769–770 (D.C Cir. 1965).

Courts have generally recognized that inter-agency and intra agency documents that reflect the government's decisional an policy-making functions are privileged and thus immune fro disclosure. See, e.g., *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeis Jena,* 40 F.R.D. 318 (D.D.C. 1966), aff'd. on opinion of Dis trict Court, 384 F.2d 979 (D.C. Cir. 1967); *Ackerly* v. *Le* F.2d (D.C. Cir. Dec. 19, 1969). Normally this privilege has bee designated as part of the Executive privilege; it also serves a corollary of the well-known rule of *United States* v. *Morga*

313 U.S. 409, 422 (1941), that an executive or administrative officer should not be examined concerning his mental and decisional processes. Frank expression and discussion within the government would not be possible if all deliberative communications were subject to outside scrutiny. Once again Recommendation 6(b) makes no attempt to delineate the boundaries of this privilege but leaves those determinations to be made on a case-by-case basis. Recent decisions have recognized that inter-agency and intra-agency documents (or portions thereof) that contain factual information or observations are not privileged; the Executive privilege only covers the statements of informers and the deliberations and recommendations of agency members or employees. *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Cooney* v. *Sun Shipbuilding and Drydock Co.*, 288 F.Supp. 708 (E.D. Pa. 1968). No doubt difficult cases will arise, but there should be many cases where the presiding officer can readily determine that the documents sought contain only relevant factual information which is not privileged. Agency production of these documents should enhance the fairness of adjudicatory proceedings and alleviate the commonplace complaint of lawyers practicing before administrative agencies that too much in agency files is kept secret.

The Freedom of Information Act already broadly provides for public disclosure of this type of material. The fifth exemption excludes from the coverage of the Act only "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party other than an agency in litigation with the agency." The effect of this provision is to make available to the general public internal memorandums and correspondence "which would routinely be disclosed to a private party through discovery process in litigation with the agency." *House Committee Report on the Freedom of Information Act* 10 (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1966). Court decisions have interpreted this exemption narrowly. An agency must produce internal memorandums or letters which would be available to any party in any litigation in which the agency having the records might become involved. The test for "availability" is the discovery practice in the federal courts; only privileged documents are exempt. *General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union, Inc.* v. *Veterans Administration*, 301 F.Supp. 796 (S.D.N.Y. 1969). An agency must therefore disclose to the general public a broad category of internal documents regardless of whether it adopts formal discovery rules. The effect of this fifth exemption differs from that of the seventh exemption for investigatory files. An agency that affords discovery to a private party of documents in its investigatory files need not make the documents available to the general public. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 38 (1967). Certainly the latter approach is more sensible because a party to an adjudicatory proceeding has a greater need to discover agency records than does a curious public citizen. Courts have recognized this problem and have held that in enforcing the Freedom of Information Act they have equity powers to "weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in the given circumstances." *General Services Administration* v. *Benson,* 415 F.2d 878, 880 (9th Cir. 1969).

These problems associated with the fifth exemption of the Freedom of Information Act should not arise when a party to an adjudicatory proceeding applies for a production order under Recommendation 6(b). Under that recommendation the presiding officer should determine whether the internal agency documents requested by the party are relevant and unprivileged. If they are relevant and unprivileged, he should order the agency to produce them unless he finds that for some other reason the party does not have good cause for their production. If the presiding officer determines that public disclosure of the documents would be undesirable, he can arrange for a protective order, as provided for in Recommendation 8. The presiding officer is well suited to make these determinations because of his thorough knowledge of the case. The FCC has recognized this fact and provided by rule that a request under the Freedom of Information Act for identifiable agency records which is made by a party to a pending adjudicatory proceeding should be ruled on by the presiding officer rather than by the Secretary of the Commission. 47 C.F.R. 0.461(e) (1969). The effect of this rule is to consolidate the otherwise dual procedures whereby a party obtains access to relevant, unprivileged documents in agency files.

Documents in Agency Files Obtained from Private Persons. Agency files are likely to contain not only documents generated or produced within the agency but also large numbers of documents obtained from private persons outside the agency. Often these latter documents are obtained in confidence. These documents are not normally available to the public under the Freedom of Information Act because they are either "specifically exempted from disclosure by statute," 5 U.S.C. 552(b)(3), or because they contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. 552(b)(4). These documents are nevertheless in the possession and control of the agency and are subject to production at the request of a party under Recommendation 6(b) if they are unprivileged and relevant to a pending adjudicatory proceeding. The mere fact that the documents were received by the agency in confidence does not make them privileged in law. There is a vast difference "between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. . . . But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. . . . That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean that such documents must be produced upon every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well-settled." *Communist Party* v. *Subversive Activities Control Board*, 254 F.2d 314, 321 (D.C. Cir. 1958) (Prettyman, J.). The agency's discovery rules should therefore apply to documents in the agency's files which have been obtained in confidence from third persons.

This application of the Discovery Recommendations should not dry up agency sources of information. Agencies today generally have the power to issue investigatory subpoenas; private persons cooperate with these agencies chiefly because they realize that if they do not supply the information voluntarily the agency can obtain it by compulsory process. No doubt some agency informants would prefer that their contributions to agency files remain hidden from view. Their concern may be met in great part through limiting discovery of this material to parties to adjudicatory proceedings conducted by the agency. Discovery would be subject to stringent protective orders in appropriate cases; and relevant evidence would be received at the hearing *in camera* where necessary. On the other hand, many persons who supply information to an agency are not particularly concerned with obtaining confidential treatment. Agencies too often promise confidential treatment as a routine matter and stamp as confidential material that need not be so classified. This practice may be gradually changing on account of the Freedom of Information Act. The fourth exemption in the Act "for trade secrets and commercial or financial information obtained from a person and privileged or confidential" is the one which generally exempts agency records obtained in confidence from third persons. However, agency records are only exempt under that provision if the party supplying the records requests confidential treatment. *The Tobacco Institute* v. *FTC*. Civ. No. 3035–67 (D.D.C. 1968).

An aspect of FTC practice raises one further problem on the discovery from the agency of documents obtained by the agency from third persons. The FTC requires that a respondent first attempt through voluntary means and through the FTC's discovery rules to obtain the documents from the persons who supplied them to the agency before obtaining discovery from the FTC's confidential files. Only if the documents are unavailable elsewhere may the respondent obtain them from the FTC. *Crown Cork & Seal Co.*, FTC Dkt. 8687 (Interlocutory Order, February 8, 1967) (Commissioner Elman dissented). To require the respondent to seek discovery from many persons for material already collected by the FTC and compiled in one place is inefficient and burdensome. Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission; Pretrial Practices, 36 *U. of Chi. L. Rev.* 113, 163–164 (1968). The public interest is not served by stretching out the prehearing process in this manner. Since the respondent will obtain any relevant, unprivileged documents eventually under the FTC practice, there seems to be no valid reason why the agency should not supply them to him in the first place. "Notice by the Commission (or respondent) to third parties that respondent is requesting their documents from FTC files would provide them with an adequate opportunity to object or to seek a protective order without subjecting such third persons to the inconvenience of being directly involved in the discovery process." Gellhorn, *supra*, at p. 165.

Recommendation 6(b) rejects this aspect of FTC practice and requires the agency to produce any relevant, unprivileged documents and tangible things in its possession or control. The agency cannot force a party to first seek discovery from third persons of documents which are in the agency's files. This rule coincides with the general practice in the federal courts. In the absence of a recognized privilege, a party cannot resist the production of documents on the grounds that he obtained the documents in confidence from third persons. See *FTC* v. *Tuttle*, 244 F.2d 605, 611–2 (2d Cir. 1957) (FTC investigatory subpoena directed to trade association).

DISCOVERY RECOMMENDATION 7. ROLE OF THE PRESIDING OFFICER

(a) *Control over Discovery*

The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the period of time during which the parties may pursue each means of discovery available to them under the rules of the agency.

(b) *Interlocutory Appeals*

Except as authorized by Recommendation 2(6), an interlocutory appeal from a ruling of the presiding officer on discovery should ordinarily not be allowed.

Discovery Recommendation 7. Recommendation 7(a) authorizes the presiding officer to impose time limitations on discovery and Recommendation 7(b) restricts interlocutory appeals from the rulings of the presiding officer on discovery. These provisions recognize the vital role played by the presiding officer at the discovery stage of the proceeding. The presiding officer must retain control over the discovery process if the parties are to obtain adequate discovery without unduly delaying the course of the proceeding. Of course, the parties will often be able to agree among themselves on the timing and scope of discovery. Recommendation 7 does not prohibit such agreements but strengthens the role of the presiding officer in resolving the disputes that do arise. Furthermore, it compliments the overall model for discovery in agency adjudication developed in these recommendations and Report. Under that model the presiding officer should assume responsibility for the satisfactory functioning of the discovery process. He should be prepared to intervene if discovery is taking too long or if the parties are wandering too far afield. Recommendation 7, in conjunction with the other recommendations, gives the presiding officer adequate authority to assert this control whenever necessary.

Recommendation 7(b) recognizes that interlocutory appeals from the presiding officer's rulings on discovery should ordinarily not be allowed. Interlocutory appeals on procedural points have often substantially delayed administrative proceedings. In some individual cases there have been five or six interlocutory appeals. See, e.g. *Koppers Company, Inc.*, FTC Docket No. 8755. Many agencies have sought by rule to restrict interlocutory appeals. Rule 3.35(b) of the FTC's Rules of Practice for Adjudicative Proceedings, for instance, provides that an interlocutory appeal from a ruling on discovery will be entertained "only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." 16 C.F.R. 3.35(b) (1969). Rules of this type should be enforced even more vigorously than they have been in the past. FCC decisions in particular have recognized that the presiding officer must have wide latitude and discretion in controlling the use of the discovery procedures if discovery is to function smoothly and expeditiously. *WSTE TV., Inc.*, 13 FCC 2d 848, 13 RR 2d 593 (Rev. Bd. 1968). Only where the presiding officer's ruling is fundamental and affects the entire case does the FCC allow an interlocutory appeal. FCC Rule 1.301, 47 C.F.R. 1.301 (1969). Other agencies should similarly limit interlocutory appeals.

Recommendation 2(6) recognizes the need for an interlocutory appeal in the exceptional situation where the presiding officer orders the deposing of an agency employee. The opening phrase in Recommendation 7 preserves this exception to the general limitation on interlocutory appeals.

DISCOVERY RECOMMENDATION 8. PROTECTIVE ORDERS

(a) *Authority of Presiding Officer in General*

The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses*

The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (1) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (2) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera Proceedings*

The presiding officer should have the authority to permit a party or person seeking a protective order to make all or part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

Discovery Recommendation 8. Protective orders are an essential part of any system of discovery. Recommendation 8 accordingly authorizes the presiding officer to formulate appropriate protective orders. Its provisions do not break any new ground but closely follow existing provisions in the Federal Rules of Civil Procedure and in the ABA's *Standards Relating to Discovery* (Tentative Draft, May 1969). The general provisions in Recommendation 8(a) derive from Rule 30(b) of the Federal Rules of Civil Procedure and the proposed amendments thereto submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The changes in Rule 30(b) proposed by that Committee involve matters of drafting and clarification rather than matters of substance, see *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery* 32 (Nov 1967). Recommendation 8(a) adopts this new and improved draft. The variety of protective orders outlined in the text should prove adequate for administrative adjudications. Subdivision 8(a)(7) should prove especially useful and permit agencies such as the FTC to limit disclosure of sensitive business information to a party's outside counsel or to other designated persons.

Recommendations 8(b) and 8(c), on the other hand, derive from Standards 4.4 and 4.6 respectively of the ABA's *Standards Relating to Discovery* (Tentative Draft, May 1969). The former recommendation authorizes the presiding officer to enter protective orders restricting or deferring the disclosure of the names of witnesses, while the latter recommendation authorizes the presiding officer to hold in camera proceedings on the issuance of protective orders. The latter provision seems noncontroversial because in a good number of cases it would defeat the purpose of a protective order to require a party to make the necessary showing of good cause in an open hearing. The former provision is essential because in a minority of proceedings there is a real danger that a witness whose name is disclosed prior to the hearing will be subject to intimidation, harrassment or other forms of pressure or influence. The general provisions on protective orders in Recommendation 8(a) do not specifically treat this problem because those provisions derive from the Federal Rules of Civil Procedure, which do not expressly authorize the pre-trial discovery of witness lists. Recommendations 1 and 3, however, require the parties to disclose their witness lists prior to the hearing; this requirement creates a need for a special provision on protective orders in such situations. Recommendation 8(b) therefore permits the presiding officer to restrict or defer disclosure by a party of the name of a witness. The presiding officer may also restrict or defer the production by a party of the narrative summary of the expected testimony of a witness and the production by the agency of a prior statement of an agency witness. These additional provisions coordinate Recommendation 8(b) with Recommendation 3, which requires not only the disclosure of a witness' name but also the production of a narrative summary of his expected testimony and, in the case of an agency witness, any prior statements by the witness in the possession of the agency or obtainable by it from any other Federal agency.

DISCOVERY RECOMMENDATION 9. SUBPOENAS

> "The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by these Recommendations that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress."

Discovery Recommendation 9. The effective functioning of discovery procedures depends on the authority of the presiding officer to enforce discovery requests through the issuance of subpoenas. Recommendation 9 accordingly provides that the presiding officer should have the authority to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. The present exclusive route for enforcement of an administrative subpoena is by agency application for a judicial order of compliance which can in turn be enforced by the court's power of contempt. Recommendation 13(5) of the prior Administrative Conference endorsed this existing practice for the enforcement of administrative subpoenas and described it in the following terms:

> "In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States within the jurisdiction of which such hearing, investigation, or proceeding is carried on, or in which the person to whom the subpena is addressed is found or resides or transacts business, should have authority to issue an order requiring such person to appear before the agency or member or officer designated by the agency, and give testimony, or produce evidence, or both, touching the matter under investigation or in question. Any failure to obey such order of the court should be subject to punishment by the court as a contempt thereof."
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> S. Doc. No. 24, 88th Cong., 1st Sess. 209, 219 (1963)

These Discovery Recommendations presuppose the continuation of this practice.

Each agency that conducts adjudicatory proceedings which are subject to sections 5, 7 and 8 of the Administrative Procedure Act (and therefore within the scope of these Discovery Recommendations) should have specific statutory authority to issue subpoenas. Under section 7(c)(2) of the Administrative Procedure Act, 5 U.S.C. 556(c)(2), any authority which the agency has to issue subpoenas automatically vests in an officer presiding at a hearing covered by that section. Recommendation 13(1)(1) of the prior Administrative Conference went further and provided that "[o]fficers presiding at adjudicatory hearings should have the authority to issue subpoenas requiring the attendance of witnesses or the production of evidence, whether or not the proceedings are governed by sections 7 and 8 of the Administrative Procedure Act." The coverage of that recommendation is broader than that of Recommendation 9 because all of the present Discovery Recommendations are limited to adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act. The narrower coverage of Recommendation 9 does not reflect, however, any intent to reject or depart from the broader recommendation of the prior Conference. The Discovery Recommendations have been formulated to apply only to formal adjudicatory proceedings subject to sections 5, 7 and 8; and the sole purpose of Recommendation 9 is to recognize that the implementation of these discovery procedures in those proceedings requires that the presiding officer have the authority to issue subpoenas. Recommendation 9 therefore does not deal with the need for subpoenas in other adjudicatory proceedings.

The great majority of agencies that conduct adjudicatory proceedings already have statutory authority to issue subpoenas; those few agencies which do not must obtain it from Congress. The principal agencies that do not presently have the subpoena power for certain of their adjudicatory proceedings are the FDA, the Post Office Department, HEW (in proceedings under Title VI of the Civil Rights Act of 1964), the Civil Service Commission, and most contract appeal boards. Many of the adjudicatory proceedings conducted by these agencies are not subject to sections 5, 7 and 8 of the Administrative Procedure Act and therefore not directly affected by Recommendation 9. However, new drug applications at the FDA and fraud and lottery orders and other mailability proceedings at the Post Office Department are subject to sections 5, 7 and 8. Under Recommendation 9 the presiding officer in those proceedings should have the power to issue subpoenas. In addition, there are a handful of little known proceedings scattered through the federal establishment where the agency lacks the power to issue subpoenas. Sometimes the absence of subpoenas has not proved to be a serious problem because all the relevant evidence is a matter of public record or in reports filed by the respondent with the agency. An example of this type of proceeding is the revocation of the license of a customshouse broker by the Department of the Treasury. This situation may be atypical and as a general matter the presiding officer should have the authority to issue subpoenas.

RECOMMENDATION NO. 22

PRACTICES AND PROCEDURES UNDER THE RENEGOTIATION ACT OF 1951

RECOMMENDATION

1. *Criteria for Determining Excessive Profits*

The Renegotiation Board should publish in an appropriate form specific information describing the manner in which it applies each of the statutory factors. In the case of statutory factors for which the Board applies quantitative norms, a guide or statement specifically describing those norms should be published. In the case of statutory factors for which quantitative norms are not ordinarily applied, the Board should publish complete descriptions of the specific matters it has taken into account in its application of these statutory factors and the relative importance it has given to such matters. In both cases, the information to be provided should, insofar as practicable, be categorized by industry or other relevant grouping.

2. *Summaries of Facts and Reasons: Statements of Facts and Reasons*

The Renegotiation Board should improve the caliber of the Summary of Facts and Reasons and the Statement of Facts and Reasons furnished to a contractor. The Summary or Statement should contain a complete analysis and explanation of the manner in which the Board arrived at its determination and should reflect the data in the Board's files upon which it has relied. This could be readily accomplished if Summaries and Statements were principally based upon the internal reports and memoranda contained in the Board's files in each case. Information concerning third parties which otherwise would be privileged or confidential upon which the Board has relied in reaching a determination should be included in a Summary or Statement of Facts and Reasons if the information can be disclosed without impairing its proprietary value or identifying its source.

3. *Performance Reports*

The Renegotiation Board should make available, upon request of a contractor, all reports it has received from procurement agencies and other parties relating to the contractor's performance under contracts subject to renegotiation for the fiscal year under consideration. The Board should delete from such performance reports only those parts which either: (a) have been classified by the originating agency for reasons of national defense or foreign policy; or (b) contain information pertaining to third persons which is privileged or confidential and which federal law prohibits from being disclosed.

REPORT OF THE COMMITTEE ON CLAIMS ADJUDICATIONS IN SUPPORT OF RECOMMENDATION NO. 22

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War may be hell for most; historically, however, it has proved exceedingly profitable for a few. Occasionally war profiteering is the result of fraud, or bribery of government representatives; more often it is the consequence of contractors being asked either to produce novel items or to achieve unprecedented production levels for which there is no cost experience.[1] Under such circumstances it ordinarily is impossible to arrive at reasonable estimates of production costs. The result frequently has been windfall profits at the expense of the public treasury. Prior to World War II the major devices for controlling this problem were taxation of excess profits,[2] as well as rigid, percentage limitations on profits under ship and airplane contracts.[3] When these techniques failed to bring about appropriate relief, post-procurement renegotiation was adopted.

The earliest renegotiation procedures were instituted administratively by the War Department in an attempt to recover unusually high profits being realized from fixed price contracts that had been let during the initial procurement spurt in the forties.[4] The procedures adopted were wholly voluntary and, when successful, resulted in reduction of prices in light of actual cost experience. In 1942, Congress adopted the First Renegotiation Act which required all military procurement contracts and sub-contracts in excess of $100,000 to contain a provision for renegotiation of the contract price and directing the Secretaries of each Department to renegotiate such contracts to recover any excessive profits received thereunder.[5] The Act did not define "excessive profits" although it did direct the Secretaries in making their determinations to disregard excess salaries and reserves in computing costs.[6] As originally enacted it authorized renegotiation on a single contract basis; a subsequent amendment during 1942 authorized renegotiation of contracts either singly or in groups.[7] This first renegotiation statute, which was based upon the practice developed by the War Department, emphasized a process of negotiation and bilateral agreement rather than adjudication and order, although the Departments were authorized to enter unilateral orders if agreement could not be attained. In large measure, the procedure was conceived of as a part of the continuum of the contracting process.[8]

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[1] See, *e.g.*, Marbury and Bowie, *Renegotiation and Procurement*, 10 Law & Contemp. Prob. 218, 219 (1943).

[2] See generally Hensel and McClung, *Profit Limitation Controls Prior to the Present War*, 10 Law & Contemp. Prob. 187, 196–199 (1943).

[3] Under the original Vinson–Trammel Act, ch. 95, 48 Stat. 505 (1934), contractors of naval vessels were ilmited to a ten percent profit. The same profit restriction was imposed on contractors of merchant ships (Merchant Marine Act, 1936, ch. 858, § 505, 49 Stat. 1998 (1936), and a twelve percent profit limitation on contracts for production of army aircraft (Act of April 3, 1939, ch. 35, § 14, 53 Stat. 560).

[4] See Marbury and Bowie, *supra* note 1 at 218-220.

In 1944, Congress adopted the Second Renegotiation Act,[9] which has been the principal model for all subsequent renegotiation legislation. The 1944 Act made some basic alterations in the process. For one, it created the War Contracts Price Adjustment Board which was authorized to administer the policy of renegotiation in place of each Department acting individually.[10] In addition, the Act authorized a contractor aggrieved by an order of the Board to petition the Tax Court for a redetermination in a "proceeding de novo" which was "not [to] be treated as a proceeding to review the determination of the Board. . . ."[11] Further, renegotiation was specifically required to be on a fiscal year basis rather than a contract by contract basis.[12] Finally, the other major change was the inclusion of the following definition of the term "excessive profits," which was taken from War Department regulations adopted under the prior legislation.[13]

> The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title to be excessive. In determining ex-

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[5] Ch. 247, § 403, 56 Stat. 245–46 (1942).

[6] *Id.* at 246.

[7] Revenue Act of 1942, ch. 619, § 801, 56 Stat. 982, 983.

[8] See, *e.g.*, Marbury and Bowie, *supra* note 1 at 224–31.

[9] Revenue Act of 1943, ch. 63, § 701, 58 Stat. 78–92 (1944).

[10] *Id.* at 85–86.

[11] *Id.* at 86.

[12] *Id.* at 83.

[13] See Lichter v. United States, 334 U.S. 742, 773–774, 783 (1948).

> cessive profits there shall be taken into consideration the following factors:
>
> (i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;
>
> (ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings and comparison of war and peacetime products;
>
> (iii) amount and source of public and private capital employed and net worth;
>
> (iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> (v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> (vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;
>
> (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.[14]

A persistent feature of renegotiation has been its temporary character. The Second Renegotiation Act was by its terms to remain in effect only with respect to contracts performed through December 31, 1944, unless extended beyond that date by the President.[15] The President exercised this authority and extended the Act's effective date an additional year.[16] No renegotiation authority existed for contracts performed during the next two calendar years. In 1948 Congress enacted new renegotiation legislation which was applicable to contracts performed after June 30, 1948 but was limited principally to contracts for procurement of aircraft.[17] Later that same year Congress authorized the Secretary of Defense to apply this legislation to other categories of procurement contracts [18] and then ultimately specified that all negotiated contracts entered into by the Defense establishment during fiscal year 1951 were to be subject to renegotation.[19] With the outbreak of the Korean War and the ensuing crash, procurement activity, Congress enacted the Renegotiation Act of 1951.[20] Most of its major provisions were based upon the 1944 Act. The principal change under the new legislation was the creation of the Renegotiation Board, a five man body independent of the departments whose procurement would be subject to renegotiation.[21] Although by its terms the Act was to apply to proceeds earned by contractors only during the calendar years 1951 through 1953,[22] the Act has been extended on nine separate occasions for periods ranging from six months to three years.[23] The most recent extension, adopted in October 1968, was for a three year period through June 30, 1971.[24]

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[14] Revenue Act of 1943, ch. 63, § 701, 58 Stat. 79 (1944).

[15] *Id.* at 88.

[16] Proclamation No. 2631, 3 C.F.R. 42 (1943–1948 Comp.).

[17] Renegotiation Act of 1948, 50 U.S.C. App. § 1193 (1964).

[18] Second Deficiency Appropriation Act, 1948, ch. 658, § 101, 62 Stat. 1049-50.

[19] General Appropriation Act, 1951, ch. 896, § 618, 64 Stat. 754 (1950).

[20] 50 U.S.C. App. §§ 1211–33 (1964).

Scope and application of the current Act.

Although the 1951 Act, as amended, contains a number of important modifications of the earlier statutes, the basic concept of renegotiation and its applicability have changed little since the 1944 legislation. The present statute applies to any contractor or subcontractor who during his regular fiscal year has receipts or accruals in excess of one million dollars from contracts [25] involving one or more of ten federal agencies—the Departments of Defense, Army, Navy, Air Force, the Maritime Administration, the Federal Maritime Board, the General Service Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration and the Atomic Energy Commission.[26] In addition, the Act applies to brokers and manufacturers' agents who receive or accrue more than $25,000 for soliciting or procuring contracts or subcontracts involving these same agencies.[27] Various types of contracts which otherwise would be subject to renegotiation have been expressly exempted—for example, contracts for agricultural commodities, mineral products, or standard commercial articles, and contracts with governmental subdivisions, common carriers and tax exempt organizations.[28]

Under the Act, contracts awarded by the covered agencies are to contain a provision under which contractors agree "t the elimination of excessive profits through renegotiation" an to include a corresponding provision in any subcontracts let in furtherance of their prime contracts.[29] The renegotiation process is commenced by the contractor filing with the Board a financial statement for the preceding fiscal year in a form which segregates renegotiable and non-renegotiable income, expenses and profit.[30] In most cases, after the Board reviews the filing, and without further proceedings, the contractor receives a clearance—a determination of no excessive profits—for that fiscal year.[31] Where the Board cannot readily determine from the statements filed that excessive profits have not been realized the cases are subjected to further scrutiny. In some of these instances a clearance issues after the contractor supplies additional information.[32] If the matter cannot be disposed of in this fashion, it is then assigned to one of two Regional Boards for investigation and processing.[33]

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[21] *Id.* § 1217.

[22] *Id.* § 1212.

[23] Act of September 1, 1954, ch. 1209, § 1, 68 Stat. 1116 (one year extension) ; Act August 3, 1955, ch. 499, § 1, 69 Stat. 447 (two year extension) ; Renegotiation Amendmen Act of 1956, ch. 821, § 2, 70 Stat. 786 (two year extension) ; Act of September 6, 1958, Pu L. No. 85–930, § 1, 72 Stat. 1789 (six month extension) ; Act of July 13, 1959, Pub. L. N 86–89, § 1, 73 Stat. 210 (three year extension) ; Act of July 3, 1962, Pub. L. No. 87–520, § 76 Stat. 134 (two year extension) ; Act of June 30, 1964, Pub. L. No. 88–339, § 1, 78 Stat. 2 (two year extension); Act of June 30, 1966, Pub. L. No. 89–480, 80 Stat. 232 (two year e tension) ; Renegotiation Amendments Act of 1968, 50 U.S.C.A. App. § 1212 (Supp. 1970).

[24] 50 U.S.C. § 1212 (1964), as amended, 50 U.S.C.A. App. § 1212 (Supp. 1970).

[25] *Id.* § 1215(f) (1).

[26] 50 U.S.C. App. § 1213(a) (1964).

[27] *Id.* §§ 1213(g) (3), 1215(f) (2).

[28] 50 U.S.C. App. § 1216 (1964), as amended, 50 U.S.C.A. App. § 1216 (Supp. 1970).

The authority of a Regional Board depends upon the amount of profits involved. Cases where a contractor's reported aggregate profits from renegotiable business are not in excess of $800,000 are designated Class B cases over which Regional Boards have final authority to issue clearances, enter into refund agreements, or if an agreement cannot be reached to enter unilateral orders determining the amount of excess profits.[34] A unilateral order of a Regional Board may be reviewed by the headquarters Board either on its own motion or upon the request of the contractor.[35]

Class A cases are those involving aggregate renegotiable profits exceeding $800,000.[36] The Regional Boards do not have final authority to dispose of Class A cases and all clearances and agreements must be approved by the Board.[37] When a clearance or agreement cannot be reached in these cases, they are reassigned to the headquarters Board together with the Regional Board's recommendation.[38]

The original renegotiation process instituted by the War Department was of a purely voluntary nature requiring the cooperation of contractors and seeking to achieve agreement as to refunds of excessive profits. The process was essentially non-adversarial and was treated in the main as part of the contracting process.[39] When renegotiation was formally enacted into law, Congress attempted to preserve this feature. Both the 1944 and 1951 Acts strongly emphasized agreement between the contractor and the Board as the desired objective.[40] And although the establishment of a body separate from the procurement agencies to conduct renegotiation tends to make the procedure somewhat more formal and less a part of the continuum of the contracting process, the Board's procedures as contained in its regulations are an attempt to de-emphasize formality and to strive for disposition by agreement rather than unilateral order.[41] This philosophy is reflected in the opportunities that are provided to contractors to discuss the matter with responsible personnel of the Board during different phases of the procedure; [42] it is also reflected in the provision of the Act which exempts the Board from all requirements of the Administrative Procedure Act except those contained in section 3.[43] During various stages of a proceeding the contractor is permitted to make presentations in support of his position and, under the Board's stated practice, he is to be advised of those matters adverse to him which are being considered.[44]

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[29] 50 U.S.C. App. § 1214 (1964).

[30] *Id.* § 1215(e)(1). See also 32 C.F.R. § 1470.3 (1969).

[31] Out of a total of 20,027 filings screened during the period fiscal years 1965 through 1969, 16,796 clearances (83.8%) were granted by the Board without further proceedings. See Renegotiation Board, Thirteenth Annual Report 6-7 (1968) [hereinafter referred to as "1968 Annual Report"].

[32] Joint Comm. on Internal Revenue Taxation, Report on the Renegotiation Act of 1951, H.R. Doc. No. 322, 87 Cong., 2d Sess. 29-30 (1962 [hereinafter referred to as 1962 Joint Comm. Rep.].

[33] 32 C.F.R. § 1471.1 (1969). See also 1962 Joint Comm. Rep. 30–37.

[34] 32 C.F.R. §§ 1471.2(b), 1472.3, 1475.3(b) (1969).

[35] 50 U.S.C. App. § 1217(e) (1964); 32 C.F.R. § 1475.3(b) (1969).

[36] 32 C.F.R. § 1471.1 (1969).

[37] 32 C.F.R. §§ 1473.2(a), 1474.3(a) (1969).

[38] 32 C.F.R. § 1475.3(a) (1969).

When a case is assigned to a Regional Board for a full investigation, a team composed of a staff accountant and a renegotiator is assigned to the matter. The accountant will review the contractor's financial statement, attempt to gain clarification of any questionable aspects and have the contractor provide whatever additional data is needed. Ultimately, the accountant will produce an accounting statement which contains, *inter alia,* detailed cost and profit analyses, as well as data on the contractor's products, plant investment, pricing, executive compensation, etc. This statement ordinarily is referred to as Part I of the renegotiation report and is made available to the contractor. Typically the contractor does not disagree with the data contained in this part of the report or its presentation.[45]

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[39] See Marbury and Bowie, *supra* note 1 at 224.

[40] Revenue Act of 1943, ch. 63, § 701; Renegotiation Act of 1951, 50 U.S.C. App. § 1215 (1964).

[41] See *e.g.,* 32 C.F.R. §§ 1472.1–1472.5 (1969).

[42] See generally 1962 Jt. Comm. Rep. 31–40.

[43] 50 U.S.C. App. § 1221 (1964).

[44] See 1962 Jt. Comm. Rep. 31–37; 32 C.F.R. § 1472.3 (1969).

[45] This account of these procedures is taken from the more complete description in 1962 Jt. Comm. Rep. 31–32.

The "renegotiator" has the responsibility for evaluating the case from the standpoint of the statutory factors and making the initial recommendation concerning the existence and amount, if any, of excessive profits. Typically, the renegotiator will meet with representatives of the contractor and make on-site inspections of facilities. He will analyze reports received from procurement agencies and others regarding the contractor's performance and will give the contractor an opportunity to discuss the proper application of the statutory factors. Ultimately he will prepare a report containing his analysis and recommendations. Ordinarily this is referred to as Part II of the renegotiation report and is not made available to the contractor. The full report is then submitted to the Regional Board and it will reach a tentative determination of the existence and amount of excessive profits. The contractor will then be advised of this determination and will be invited to attend a conference with the renegotiator and accountant at which time the reasons for the tentative decision are supposed to be made known to him. If the contractor does not assent to the determination he is given an opportunity to meet with a panel of the Regional Board to discuss the matter further. After this meeting a panel report will be written which reviews and analyzes the case and contains the panel's recommendation with respect to the amount of excessive profits. If an agreement still cannot be reached with the contractor, who does not receive a copy of the panel report, the case goes to the full Regional Board and it reaches a final determination. At this stage the contractor is entitled to receive a written statement summarizing the Regional Board's reasons for its determination.[46]

If the contractor is unconvinced and refuses to enter into an agreement, a unilateral order is entered if the case does not involve more than $800,000 of excessive profits or is assigned to the Headquarters Board if the excessive profits determined were more than that amount. The proceedings on the Headquarters Board level, both in reassigned cases and those on appeal from a unilateral order, parallel the proceedings at the Regional Board level. If the contractor remains unconvinced and refuses to enter into an agreement, a unilateral order is then entered.[47] The contractor has ninety days from entry of a unilateral order to commence a proceeding in the Tax Court for redetermination.[48]

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[46] *Id.* at 32-37. This so-called "Summary of Facts and Reasons" issued by the Regional Boards, is provided for by the Board's regulations (32 C.F.R. § 1477.3 (1969)) and should not be confused with the statutory statement required under 50 U.S.C. App. § 1217(a) (1964):

> Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis thereof and of its reasons for such determination. Such statement shall not be used in the Tax Court of the United States as proof of the facts or conclusions stated therein.

See 32 C.F.R. § 1477.2 (1969) governing the issuance of the statutory statement in cases when a Regional Board determination is "deemed to be the determination of the Board."

Cases that go through the full procedure and result in the entry of a unilateral order are a small minority of the total number filed. During each of the fiscal years 1965, 1966 and 1967 the Board received an average of approximately 3,500 filings from contractors and subcontractors whose renegotiable business exceeded the statutory minimums.[49] In fiscal 1968 and 1969 the number of filings rose to 4,552 and 5,030 respectively,[50] reflecting an increase in military procurement which rose from $28 billion in 1965 to $44.6 billion in 1967.[51] The percentage of total filings that received clearances without assignment to a Regional Board ranged from approximately 90% in 1965 to 80% in 1969.[52] These were cases in which, based on the statements of income and expenses filed by contractors, the Board was able without further investigation to make the judgment that the profits reported were not excessive. Those filings which raised questions that could not be resolved on the basis of the financial statements filed by contractors were assigned to Regional Boards.[52a] From the Board's inception in 1951 through June 30, 1968 determinations of excessive profits were made in 3,801 cases for a total of more than $975 million.[53] Of these, 3,402 determinations were the result of bilateral agreement with contractors and aggregated over $688 million.[54] Of the 399 unilateral orders entered, 152 were taken by contractors to the Tax Court for redetermination.[55] These latter cases involved excessive profit determinations totalling nearly $172 million.[56] Of the cases that went to the Tax Court, fifty-three were dismissed, thirty-five were disposed of by agreement, thirty-two resulted in redetermination by the Court and thirty-two were still pending on June 30, 1968.[57]

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[47] See 1962 Jt. Comm. Rep. 37–40.

[48] 50 U.S.C. App. § 1218 (1964).

[49] 1968 Annual Report 6.

[50] The 1968 data was derived from the Annual Report, *id.;* the 1969 data was provided by the Board at my request.

[51] H.R. Rep. No. 1398, 90th Cong., 2d Sess. 3 (1968).

[52] The 1965 data was derived from 1968 Annual Report 7; the 1969 data was provided by the Board at my request.

[52a] An undetermined number of cases assigned to Regional Boards ultimately receive clearances. Although the precise number is not known, it is not believed to represent a significant portion of the cases assigned.

[53] 1968 Annual Report 12.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 13.

[57] *Id.*

Despite the rather large percentage of dispositions by the Board that are either agreed to or not further contested, the renegotiation process, as well as the manner in which it is administered, has been the subject of continuous debate almost from its inception. The principal criticism, raised periodically each time Congress considers extending the Act, is directed to the need and desirability for post-procurement renegotiation by a separate agency. The arguments against extending the Act have included, *inter alia*, the claims that: procurement agencies adequately perform the same function on a contract by contract basis; the process as administered by the Board does not produce sufficient results to justify its continuation; the process reduces profits to a level so low as to discourage manufacturers from accepting government contracts.[58] These arguments have not dissuaded Congress from continuing the Act in essentially its original form and have at most resulted in amendments that exempt a large number of contractors from renegotiation.[59] This study has not been concerned with the dispute over the wisdom or necessity of the policy of renegotiation or the means adopted by Congress for its administration. The study has been concerned with a number of recurring criticisms directed at the manner in which the Act has been administered by both the Renegotiation Board and the Tax Court.

The principal criticisms levelled against the Board are: (1) its failure to articulate the criteria and standards it applies in arriving at a determination of the existence and amount of excessive profits;[60] and (2) its refusal to make available to contractors reports concerning their performance which the Board solicits from procurement officials and other contractors.[61] The criticism directed at the Tax Court is that contrary to the Act it has failed to provide aggrieved contractors with "de novo" redeterminations of excessive profits and instead has treated renegotiation cases as review proceedings.[62]

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[58] Typical of these criticisms is the statement of Rep. Charles S. Gubser, Hearings on Extending and Amending the Renegotiation Act Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. 67–85 (1968). *But see* Statement of Rep. Henry B. Gonzalez, *id.* at 117–189.

[59] This has been accomplished by a variety of modifications, *e.g.*, exempting contracts for sales of "standard commercial articles or services" (50 U.S.C. App. § 1216(e) (1964), as amended, 50 U.S.C.A. App. § 1216(e) (Supp. 1970)) ; raising the minimum amount of aggregate annual receipts which bring a contractor within the Act from $250,000 (Renegotiation Act of 1951, ch. 15, § 105(f), 65 Stat. 16–17 to $1 million (50 U.S.C. App. § 1215(f)(1) (1964)).

[60] See, *e.g.*, Marcus, *The Need for Standards in Renegotiation and Other Determinations of Defense Profits*, 32 Geo. Wash. L. Rev. 23, 29–43 (1963); Koehler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. L. Rev. 1, 3–7 (1959); Mahoney, *The Conduct of a Renegotiation Case*, 47 A.B.A.J. 872, 874–75 (1961). See also K. Davis, Discretionary Justice: A Preliminary Inquiry, 16–17 (1969); Staff Report on the Renegotiation Act of 1951, Joint Comm. on Internal Revenue Taxation 55–58 (1968).

[61] The Board's regulations formally preclude discovery of these reports. 32 C.F.R. § 1480.9 (b)(2) (1969). This regulation is presently under attack. See Brief for Appellant at 15–23, Grumman Aircraft Engineering Corp. v. The Renegotiation Board, Court of Appeals for the District of Columbia, No. 22,635 (D.C. Cir. 1969). Compare Boeing v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960).

I. BOARD'S FAILURE TO ARTICULATE CRITERIA

As previously noted, the First Renegotiation Act did not contain a definition of the term "excessive profits"—the Secretaries of the various departments were merely "directed to eliminate any excessive profits" realized by a contractor.[63] The Second Renegotiation Act, enacted in 1944, elaborated on the term by providing a number of factors to be taken into account by the War Contracts Price Adjustment Board in determining the existence and amount of excessive profits.[64] The definition adopted in 1944 was, with minor modification,[65] repeated in the Renegotiation Act of 1951 and has remained unaltered since. Under the Act: [66]

> The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:
>
> (1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;
>
> (2) The net worth, with particular regard to the amount and source of public and private capital employed;
>
> (3) Extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> (4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> (5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;
>
> (6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall

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[62] See, *e.g.*, Koehler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. L. Rev. 1, 8–20 (1959); Marcus, *The Need for Standards in Renegotiation and Other Determinations of Defense Profits*, 32 Geo. Wash. L. Rev. 23, 43–51 (1963).

[63] Sixth Supplemental National Defense Appropriation Act, 1942, ch. 247, § 403, 56 Stat. 245, 246. See text at note 6 *supra*.

[64] Revenue Act of 1943, ch. 63, § 701, 58 Stat. 79 (1944). See text at notes 13–14 *supra*.

[65] *Compare* quote at p. 3 *supra with* quote at p. 13 *supra*.

[66] 50 U.S.C. App. § 1213(e) (1964).

> be published in the regulations of the Board from time to time as adopted.

In 1948 the Supreme Court, in *Lichter* v. *United States*,[67] held that the predecessor definition contained in the Second Renegotiation Act was not an invalid delegation by Congress and was sufficiently definite to guide those administering the Act. In reaching that conclusion the Court suggested that the elaboration contained in the 1944 Act was probably not essential to the Act's validity; it further stated, "it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."[68] There is no reason to believe that the Court would change its ruling if the present Act were challenged on the same ground.

The Court's holding on the constitutional issue, however, has not prevented very sharp criticism of the manner in which the Board has administered the Act. Although very extensive and detailed regulations have been promulgated with respect to almost every phase of the renegotiation process, the Board's regulations pertaining to the meaning of and manner of applying the statutory criteria for determining excessive profits are of nominal, if any, assistance in predicting a result in a given case or in evaluating the propriety of a determination by the Board.[69] This is not to suggest that absolutely no attempt is made to provide guidance. The Board has supplied some very general statements of the manner in which each factor will be treated. What it has not attempted to do is to give any sort of quantitative or other specific content to any of the factors or to give any meaningful indication of the appropriate mix of factors that will produce favorable or unfavorable results. The Board's attitude is summarized in its preface to the regulations governing "Principles and Factors in Determining Excessive Profits":

> Reasonable profits will be determined in every case by over-all evaluation of the particular factors present and not by the application of any fixed formula with respect to rate of profit, or otherwise. Renegotiation proceedings will not result in a profit based on the principle of a percentage of cost.[70]

In his recent work, DISCRETIONARY JUSTICE, Professor Kenneth Davis summarized the dissatisfaction of many critics of the Board when he used renegotiation as a prime example to illustrate his contention that administrative discretion in the United States too often lacks sufficient standards to guide its exercise.

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[67] 334 U.S. 742 (1948).

[68] *Id.* at 785.

[69] See 32 C.F.R. §§ 1460.8–1460.15 (1969).

[70] 32 C.F.R. § 1460.8 (1969).

> The history of renegotiation since enactment of the Act of 1951 is an outstanding example of discretion which is needlessly broad. Senator Taft aptly said in 1951 that "this Board would have perfectly unlimited discretion." The Renegotiation Board has not significantly confined its own discretion through regulations, policy statements, or adjudicatory opinions. The thousands of decided cases could have become important guides for discretion, but a regulation explicitly provides that opinions and orders are unavailable to the public "inasmuch as they are regarded as confidential for good cause shown, by reason of the confidential data furnished by contractors and relating to their business." The regulation also provides that "Opinions and orders are not cited as precedents in any renegotiation proceedings." Although the board properly protects confidential business information, its concealment of its grounds for decisions seems clearly unjustified. Whatever standards, principles, or rules it has developed should be out in the open. This kind of disclosure can easily be accomplished without revealing confidential information; even when facts need to be stated, the identification of particular parties can be withheld.[71]

Some critics go further, casting doubt upon the existence of any meaningful standards and suggesting that the Board's determinations are unguided, unprincipled judgments which are essentially arbitrary in nature.[72] This claim gains support from the Board's refusal to publish any sort of opinions or interpretative type regulations providing detailed elaboration of the manner in which it applies the statutory factors.

These arguments have great appeal: the question this study is concerned with is whether they have any validity. Is it true that the Board's determinations amount largely to pulling numbers out of a hat? If the Board's decisions are principled is it feasible or wise to provide greater specificity for the standards and criteria being applied as well as the manner in which they are applied? These questions cannot be answered by a doctrinaire analysis based upon comparisons with licensing departments, tax collectors, or zoning boards. A fair analysis can proceed only from a recognition that the renegotiation process and the Board are largely *sui generis*. At best, there are some activities carried on by more traditional agencies that are analogous although not identical. For example, few agencies that engage in adjudicatior reach their decisions almost entirely on the basis of confidential financial information supplied by those whose interests are being determined. Moreover, few administrative bodies are required to apply a statutory term as amorphous as "excessive profits" and are further directed to do so by taking into account a set of touchstones as variable and uncertain as efficiency, extent of risk, reasonableness of costs, contribution to defense effort, etc. Add to these considerations the almost inexhaustible variety of products and services contracted for as well as the infinite variations between industries, contractors within the same industry and the type of contracting used by the various procurement agencies. To all of this, add in one of the principal features of the process which is to proceed by "negotiation" in an effort to reach "agreement" rather than by adjudication resulting in entry of an order. Finally, consider the impediments created by the provision of the criminal code[73] making it a criminal offense for officials in any manner to divulge or otherwise disclose the data and information upon which the Board bases its determinations.

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[71] Davis, Discretionary Justice: A Preliminary Inquiry, 16–17 (1969).

[72] Although no one has explicitly stated a position as strong as this in print, a numbe of practitioners who handle renegotiation matters have seriously expressed this view in con versations with the author.

The initial step in evaluating these criticisms was to determine whether the Board reaches its determinations in a principled, conscientious manner. The only feasible way this could be learned was to examine the complete files of a sufficient number of cases that had been through all or most phases of the renegotiation process. The cases that were selected for scrutiny were those in which the Board had entered unilateral orders determining excessive profits and the contractors had taken the matters to the Tax Court for redetermination. This method of selection was chosen principally because it seemed a valid assumption that cases in which an agreement could not be reached and contractors were willing to pursue Tax Court proceedings would most likely reveal any failures that were prevalent in the Board's procedures. In addition, this approach also tied in directly to another question under study: the evaluation of the manner in which the Tax Court has discharged its responsibilities with respect to renegotiation cases.

The total number of files reviewed was eight, involving determinations for contractors' fiscal years during the period 1952 to 1960. The small number of cases studied was the result of the method of selection. Since 1944 the Tax Court has published approximately one hundred opinions involving renegotiation. Only nineteen of these involved cases under the Renegotiation Act of 1951; the remaining cases involved renegotiation dating from

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[73] 18 U.S.C. § 1905 (1964).

1943 to 1951. In only eleven of the nineteen cases arising under the 1951 Act did the Tax Court determine whether excessive profits existed and, if so, in what amounts.[74] The decisions in the other eight involved questions such as, claims of exemption, the Board's jurisdiction, discovery, burdens of pleading and proof.[75] The Board was able to locate the files in only eight[76] of the eleven cases requested and those were made available to me for my inspection.

Although a study of merely eight out of more than 3,800 cases in which the Board has made determinations of excessive profits may seem an exceptionally slender sampling upon which to base any meaningful conclusions, it should be remembered that about ninety percent of the 3,800 determinations were the result of bilateral agreements.[77] Of the approximately 400 unilateral orders entered through June 30, 1968, only 152 became the subject of Tax Court proceedings and most of those were disposed of either by agreement or dismissal and, therefore, did not come to our attention through the Tax Court Reports.[78] The reported opinions of the court identified only eleven cases in which the litigated issue was excessive profits.

The conclusion reached from reviewing the files in these cases is that the Board does approach its task in a conscientious and principled manner. Each of these files is replete with internal memoranda and reports evaluating the critical aspects of each contractor's operations and performance and discussing in varying degrees of detail the manner in which the various statutory factors were being considered and applied. Although the caliber of the analysis and the thoroughness of the reasoning varied from case to case, and from factor to factor in individual cases, all of them exceeded minimal standards of diligence and thoughtfulness in preparation and processing. Assuming these cases to be representative, the suggestion that the Board's determinations of excessive profits are arbitrary and akin to pulling numbers out of the air is without warrant.

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[74] LTV Aerospace Corp. v. Renegotiation Bd., 51 T.C. 369 (1968); Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856 (1968); Martin Mfg. Co. v. Renegotiation Bd., 44 T.C. 559 (1965); Baltimore Contractors, Inc. v. Renegotiation Bd., 43 T.C. 611 (1965); North American Aviation, Inc. v. Renegotiation Bd., 39 T.C. 207 (1962); Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962); Bay Co. v. Renegotiation Bd., 38 T.C. 535 (1962); Boeing Co. v Renegotiation Bd., 37 T.C. 613 (1962); List & Clark Constr. Co. v. Renegotiation Bd., 3 T.C. 823 (1961); Waltham Screw Co. v. Renegotiation Bd., 31 T.C. 227 (1958); Vaugh Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958).

[75] Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 52 T.C. 152 (1969); Michigan Chemical Corp. v. Renegotiation Bd., (49 T.C. 488 (1968); Hermetic Seal Prod. Co. v Renegotiation Bd., 41 T.C. 223 (1963); North American Aviation, Inc. v. Renegotiation Bd 36 T.C. 575 (1961); Litton Indus. v. Renegotiation Bd., 36 T.C. 431 (1961); Hooper Constr. C v. Renegotiation Bd., 35 T.C. 837 (1961); Albermarle Paper Mfg. Co. v. Renegotiation Bd., 3 T.C. 438 (1960); Golbert v. Renegotiation Bd., 28 T.C. 728 (1957).

[76] Files could not be located in the cases of Beets and Yeckel v. Renegotiation Bd., 3 T.C. 677 (1962); List & Clark Constr. Co. v. Renegotiation Bd., 35 T.C. 823 (1961); Vaugh Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958).

[77] See notes 53 and 54 *supra*.

[78] See text accompanying notes 55 through 57 *supra*.

The critical questions are: whether the manner by which a determination is ultimately reached involves the application of some sort of standards and criteria; and, if so, whether these are susceptible of meaningful publication in the form of opinions, regulations, rulings, or bulletins. My review of these files, together with discussions with various Board personnel, leads to the conclusion that general standards of a variable nature are known and applied by those responsible for formulating decisions. For example, in applying the statutory factor of reasonableness of costs and profits, outer limits of what is deemed to be unexceptional for a particular industry or sub-industry were obviously being applied in these cases. If a particular case involved a ratio of profits to costs that exceeded what was apparently deemed to be the normal range for that industry, further consideration and investigation resulted. This type of variable, quantitative criteria for segregating normal and abnormal situations was found to exist also to some degree in the application of the following statutory factors: net worth (i.e., ratio of profits to net worth employed); extent of subcontracting; and rate of turn-over. There did not appear to be comparable standards in use for application of the remaining statutory factors: efficiency, extent of risk, contribution to defense effort, or character of business.

A major impediment to publishing the types of criteria that apparently are being used by the Board arises from the confidentiality restrictions imposed upon it by statute.[79] In most of the files studied the Board appraised the contractor's performance with respect to one or more factors by direct comparison with data derived from renegotiation files for other contractors in the same industry. On occasion the data was on an industry basis; just as often, however, the data was specific with respect to particular competitors in the same industry. This type of specific comparison, derived from confidential data in the Board's files or from the renegotiation experience of Board personnel who specialize in particular industries, was used for judging whether the contractor under consideration was within the norms for earnings within an industry, profit to net worth, profit to sales, amounts of government capital (plant facilities) used and rate of turn-over. In these same cases, the Board also made comparisons with general, aggregate industry performance data in evaluating some of the same factors. Much of this letter data was derived from public sources, such as Census Bureau statistics and Standard and Poors industry reports; other composite data appeared to be derived from the Board's own experience with a particular industry but was sufficiently generalized so as to be publishable without risking violation of the confidentiality restrictions.

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[79] 18 U.S.C. § 1905 (1964); Int. Rev. Code of 1954, § 7213.

Professor Davis[80] and others have suggested that the Board could, without breaching the confidentiality restrictions, issue opinions explaining its determinations. In effect, they are suggesting a "sanitized" opinion in which all specific data of an identifiable character has been excised from the statement. In my view, such opinions would be of no significant value. The documents most akin to an opinion contained in the file of a typical renegotiation case are the renegotiator's report, the report of the panel of the regional board and the report of the division of the headquarters board. All of these are replete with specific data that could not be published under existing confidentiality restrictions. I can conceive of no way, even with names and other identifying details excised, to publish these reports without the identity of the sources being fairly obvious to those familiar with the particular industry involved; nor can I conceive of any way to delete this data and still have a meaningful opinion that would be of any significant precedential value. Moreover, I know of no way to replace this type of specific data with some form of generalized data that might make the result either comprehensible or useful.

On the other hand, it does not seem either impossible or futile for the Board to publish some form or regulation, bulletin, or guideline that would supply at least a modicum of meaningful guidance to the public for those aspects of its decisions that involve the application of quantitative standards, even though these standards may be of an exceedingly variable and non-permanent nature. Unless the files in the cases that I reviewed were not representative of the Board's usual approach, the disposition of most cases involves some degree of comparative analysis of a quantitative nature. By no means are such quantitative standards determinative, nor was it Congress' intention that they be so.[81] The approach observed in the files under review was to use quantitative comparisons solely to determine whether, with respect to a particular statutory factor (such as "net worth"), the contractor was within or without what had previously been deemed to be an average range for the particular industry or other grouping within which the contractor fell. This type of generalized standard, which probably could only be expressed in terms of numerical ranges, could be published in the form of bulletins which would not be vastly different from some of the recently published Renegotiation Rulings and Bulletins which, for example, provide guides for determining when institutional advertising costs may be applied against renegotiable income.[82]

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[80] See note 71 *supra.*

[81] One of the factors leading to the enactment of renegotiation legislation was dissatisfaction with the effectiveness of the strict, quantitative profit limitations under legislatio

Of course, not all of the factors that the Board is required to consider in reaching a determination can be qualified. There is no evidence that the Board does or is able to give any sort of quantitative content to factors such as contribution to the defense effort, efficiency, complexity of manufacturing technique, etc. Through its regulations the Board has attempted to supply at least a modicum of guidance concerning the types of matters it will consider in applying those factors that do not lend themselves to quantification.[83] In addition, there does not seem to be any way to describe quantitatively or otherwise (short of publishing opinions for all cases) the proper mix to be given to the multivarious factors that are to be considered under the Act. Although a particular factor may weigh in favor of the contractor, the actual effect it will have on the ultimate determination will vary from case to case depending upon the absence or presence as well as the strength of other factors. In some respects the determination of excessive profits is analogous to placing a dollar value on pain and suffering. The trier of fact in the tort case is required to take into account a number of exceedingly variable and amorphous factors, a few of which can be given some degree of quantitative substance. Yet, no satisfactory formula has so far been devised to explain the appropriate mix or weight to be given to all of the factors involved. They are, as in the renegotiation process, principally touchstones which provide guidance in arriving at a largely discretionary judgment.

The Board has taken a negative attitude toward all suggestions that it publish any of the quantitative standards it uses. A number of reasons were given for this position. First, it pre-

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such as the Vinson-Trammell Act and the Merchant Marine Act. See note 3 *supra*. Under the Renegotiation Act these rigid profit limitations have been suspended in favor of a flexible approach. See 50 U.S.C. App. § 1212(e) (1964); 32 C.F.R. § 1460.8 (1969).

[82] 34 Fed. Reg. 7421 (1969).

[83] 32 C.F.R. §§ 1460.9 (efficiency), 1460.12 (contribution to defense effort), 1460.14 character of business).

dicts that the publication of quantitative standards will tend to emphasize a rate-of-return type of approach which is antithetical to the entire notion of the renegotiation process. Second, the Board takes the position that since the proceedings on its level are largely a process of negotiation, and since its determinations are not reviewed for error, it is pointless to publish this type of regulation or guideline, particularly in light of the variable nature of the standards employed. Finally, the Board argues that it presently lacks sufficient personnel who possess the qualifications needed to take on this task.[84]

Except for the shortage of personnel, the Board has not made a convincing case for not publishing these standards and criteria. Contractors are entitled to know how the Board approaches these factors and what quantitative ranges, if any, are being applied. There is no reason to assume that publication of information describing the way the Board functions in this respect will result in overemphasis of a fixed rate of return approach. On the other hand, culling this sort of data out of the Board's files, organizing it in a useful form and keeping it current will require the expenditure of skilled manpower. With the recent, sharp rise in the number of filings,[85] it may not be practical or worthwhile to undertake this task without an authorization for additional personnel.

A related criticism of the Board involves the statement of facts and reasons the Board is required by the Act to give to a contractor upon request when an agreement cannot be reached and a unilateral order is entered.[86] Although the Act only requires the statement to issue after an order has been entered, under the Board's regulations a "summary of the facts and reasons" will be given to a contractor where the Board has reached a final determination but has not as yet entered an order and a contractor wishes the statement to assist him in deciding whether to accept the Board's determination.[87] A summary is also available from a Regional Board when it has reached a final determination and is prepared to enter a unilateral order in a Class B case or to make a final recommendation to the headquarters Board in a Class A case.[88] Apparently, the summary which issues pursuant to the Board's regulations before entry of a unilatera order is essentially identical to the statement of facts and reasons required under the Act.[89]

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[84] The Board's personnel declined from a high of 742 in 1953 to 178 in 1967, 1968 Annua Report 15. Additional authorizations permitted the total number to rise to 203 employees at th end of fiscal 1969.

[85] The number of filings rose from 3,737 in fiscal 1967 (1968 Annual Report 6), to 5,03 in fiscal 1969 (unpublished data provided by the Board upon my request).

[86] 50 U.S.C. App. § 1215(a) (1964).

[87] 32 C.F.R. § 1477.3 (1969).

[88] *Id.*

The criticism often heard is that the summaries and statements are generally of little or no assistance to contractors in understanding how the Board reached its determination. A review of the statements provided in nine cases (the eight files provided to me by the Board plus one other made available by counsel in a proceeding recently concluded) supports the criticism. The requirement of confidentiality which makes it impractical for the Board to publish meaningful opinions, is not a serious impediment to providing a meaningful statement of facts and reasons to the contractor himself. Certainly all relevant data concerning the contractor's own operation can be included; only specific data concerning other contractors which the Board received in confidence and which might have been used for comparative purposes cannot be revealed. Yet, contrary to the Board's own regulation governing the content of statements and summaries,[90] the statements reviewed lacked any genuinely useful detailed analysis of the facts and, necessarily, provided little if any insight into the Board's decisional process. With one exception the statements reviewed were superficial, pro forma documents, the principal feature of which was a host of broad generalities. Typically the statements contain a section of sparse accounting data and then mechanically list the various statutory factors together with a bare conclusionary statement as to each factor's application to the particular case. Not only are these statements largely useless for the purpose they are supposed to serve, but they lead to the unwarranted conclusion that they accurately reflect the Board's decisional processes. As noted earlier, each of the files in the eight cases reviewed contained renegotiators' reports as well as panel and division reports which adequately analyzed the case, discussed the contractor's contentions and recommended a determination with supporting reasons. The statements of facts and reasons issued by the Board bore minimal resemblance to these documents and thereby create the impression that the Board engages in little if any conscientious analysis of the cases. More complete statements of facts and reasons based upon the internal reports contained in the files will accomplish a twofold purpose: they will better assist contractors in deciding whether to agree to the entry of an order; they will help to preclude harsh judgments concerning the manner in which the Board makes its determinations.

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[89] 32 C.F.R. § 1477.4 (1969).

[90] *Id.*

II. Performance Reports

In reaching its determination as to the existence and amount of excessive profits, the Board considers the contractor's performance with respect to such things as his contribution to national effort, his cooperation with Government agencies and other contractors, his dependability with respect to delivery schedules and the quality of the product or service provided. This information is acquired principally from two sources—the contractor himself and the procurement agencies he serviced. After a case is assigned for processing the renegotiator will meet with the contractor or his representatives who generally submit written or oral statements regarding the favorable performance rendered. In some instances the contractor will submit elaborate printed materials and testimonials to demonstrate the favorable consideration he is entitled to in the evaluation of his renegotiable profits. The Board independently seeks information about the contractor's performance by soliciting from the procurement agencies for which he worked statements appraising his performance. If the firm being renegotiated was a subcontractor similar inquiries are made of the prime contractor or higher tier subcontractors.

The Board has traditionally resisted all attempts by contractors to inspect performance reports relating to their own cases. The Board takes the position that if these reports become freely discoverable, the procurement officials who write them and who often have a continuing relationship with the contractors will be deterred from providing the Board with candid and complete information. The Board also supports its position on the ground that performance reports frequently contain confidential information about third parties—*e.g.*, comparative pricing data for other contractors—and thus cannot be released.

Although the Board so far has successfully resisted attempts to compel it to produce performance reports on the administrative level, it has not succeeded in avoiding production in the Tax Court when a contractor has petitioned for redetermination. In 1958, the Boeing Airplane Company sought a subpoena duces tecum from the Tax Court ordering the Board to produce al of its files pertaining to Boeing for the fiscal year under consideration. The Tax Court issued the subpoena on the ground that th documents sought were needed for the proper trial of the case When the Board refused to comply with the subpoena on th claim of executive privilege, Boeing unsuccessfully sought enforcement in the District Court. Subsequently, the District Cour modified its position, ordering production only of performanc reports the Board had received from the Air Force.[91] This order was taken on cross-appeals to the Court of Appeals which held that in the Tax Court proceedings the contractor was entitled to performance reports received by the Board from outsiders, as well as factual reports concerning the contractor that were prepared by Board personnel.[92] However, the Court excluded from production documents which "deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it." [93]

The most significant limitation of the decision in the *Boeing* case is its application solely to proceedings in the Tax Court. It provides no authority for discovery of performance reports or other records of the Board while the case is on the administrative level. At the time the *Boeing* case was decided there existed no specific authority under which a contractor could compel the Board to produce performance reports. Until the enactment of the Freedom of Information Act,[94] section three of the Administrative Procedure Act,[95] the only provision of that law applicable to the Board,[96] was entirely ineffective for achieving this purpose.

In 1968, the Grumman Aircraft Company brought suit under the Freedom of Information Act seeking to compel the Board to produce for Grumman's inspection: (1) all performance reports and other inter- and intra-agency records of a factual nature contained in the Board's files relating to the renegotiation of Grumman for the year 1965; and (2) the final orders and opinions of the Board in renegotiation proceedings involving fourteen other aircraft manufacturers for the period 1962 through 1965.[97] In opposition, the Board contended that the documents sought by Grumman are exempt from the general disclosure provisions of section (a) of the Information Act because they are either specifically exempted from disclosure by statute, or contain trade secrets and commercial or financial information obtained from a person and privileged or confidential or are intra-agency memorandums which would not be available by law to a party in litigation with the Board.[98] On cross-motions for summary judgment, the District Court granted the Board's motion and entered an order, without opinion, dismissing the suit. Grumman has appealed to the Court of Appeals for the District of Columbia Circuit and that appeal is presently pending. Oral argument is not expected to take place until October or November and a decision is not anticipated before December.

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[91] Petition of Boeing Airplane Co., 23 F.R.D. 264 (D.D.C. 1959).

[92] Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960).

[93] *Id.* at 660.

[94] 5 U.S.C. § 552 (Supp. III 1965–1967).

[95] Ch. 234, 60 Stat. 238 (1946).

[96] 50 U.S.C. App. § 1221 (1964).

[97] Brief for Appellant at 2–3, Grumman Aircraft Engineering Corp. v. Renegotiation Bd., No. 22,635 (D.C. Cir. 3/12/69).

[98] Brief for Appellee at 6–10, Grumman Aircraft Engineering Corp. v. Renegotiation Bd., No. 22, 635 (D.C. Cir. 5/19/69).

Because the Grumman case is *sub judice* it seems inappropriate either to comment on the merits of the claim under the Freedom of Information Act or attempt to predict the decision of the Court of Appeals. The positions taken by both parties are tenable and the court's decision cannot readily be anticipated.

Even if we assume, however, that the Information Act does not compel the Board to make performance reports available to the public, there still remains the question of whether the Board should, as a matter of policy, make them available to contractors whose cases are pending before the Board. The argument made by those who urge production of performance reports on the administrative level is simply that they are entitled to be apprised of information concerning their performances which is before the Board when it makes its determination. The Board's response is that the contractor is always advised of any derogatory or adverse information the Board has received and is relying upon. It further argues that, since the contractor is advised of these adverse matters, there is no need to give him all reports received. Furthermore, it claims that to do so will clutter up the renegotiation proceeding by placing unwarranted emphasis on matters contained in these reports which the Board intends to ignore because it deems them to be immaterial, unsubstantiated, or irrelevant. Added to these arguments are the assertions, mentioned earlier, that the reports often contain confidential information about other contractors and that procurement agencies and prime contractors will be impeded from giving frank assessments if the reports are made available to contractors.

At my request the Board made available for my inspection representative performance reports in approximately ten cases currently pending before the Eastern Regional Board. In addition, I reviewed the performance reports in the files of the eight concluded cases that were made available to me. In all, I perused approximately twenty-five separate reports received from either procurement agencies or prime contractors. Only three or four contained any sort of direct criticism of or information adverse to the contractor. All of the rest were either wholly uninformative or were complimentary. Only two contained information tha was of a privileged or confidential nature: on one occasion, contracting officer stated that the firm under consideration was priced well below its competitors and he supplied comparative figures which apparently were derived from sealed bids; in another instance, a performance report dealing with a weapons system had been classified as secret at the time it was submitted to the Board.[99]

I was advised that to the extent these reports were uncritical of contractors they were quite representative of what the Board receives. Whether this is so because contractors generally perform to at least minimally acceptable standards or because such an identity of interest exists between contractors and procurement officials as to result in a non-critical attitude, cannot satisfactorily be determined within the scope of this study, nor is it important for our purposes. It does, however, undercut the Board's assertion that production of these reports would tend to deter procurement officials from being critical, particularly since the Board contends that contractors are apprised of any adverse information the Board has received and is relying on. If the sampling I inspected is representative, then there is little in the way of adverse reports that could be lost; further, if the Board apprises the contractor of critical information received then any contracting officers who might be deterred[100] by such exposure would already be avoiding criticism of their contractors. Thus, it is difficult to accept the claim that production of these reports will result in a deterioration of critical reporting. Moreover, if the reports were made available any confidential or privileged data which they might contain could be excised.

Additionally, procurement officials of the Defense Department and NASA stated that the efficiency of their procurement programs would not be impeded if performance reports prepared by their contracting officers were made available by the Board to contractors. It was pointed out that presently, as part of the procurement policy of Defense and NASA, contracting officers prepare contractor evaluation reports which are disclosed to contractors. These reports are thorough and frank studies of all phases of a contractor's performance and frequently are the basis for performance reports sent to the Renegotiation Board. Defense and NASA officials are not aware of any measurable, adverse effect on their procurement activities as a result of the evaluation reports being made available to contractors.

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[99] The report had been declassified by the Defense Department prior to the time it was made available to me.

[100] *Cf.* Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 661 (D.C. Cir. 1960):

> The likelihood seems slight that in the future persons outside the Board, be they other public officials or private persons, will avoid providing the Board with all information requested if production of documents is judicially ordered in this case. None of the information is said to come from persons who would be subject to retaliation if their statements were disclosed. . . . And the public officials responsible for material procurement would presumably cooperate with the Board as a part of the discharge of their responsibilities for the efficient operation of their respective departments.

The Board's additional arguments—*viz.* that making these reports available will cause contractors to overemphasize the statutory factors that involve performance and will turn the proceeding into more of an adversary proceeding than an informal negotiation—are not convincing. Even though the Board apprises a contractor of adverse information which the Board "relies" upon, this does not provide assurance that erroneous information received by it may not have affected its judgment even though the Board may not believe, or even realize, it is "relying" upon such. If the contractor is made aware of the existence of such information he can, if he wishes, rebut or explain it. Moreover, even though the renegotiation process emphasizes informal negotiation rather than the features of an adversary proceeding, there is no justification for maintaining a secretive approach to information which might have a material effect upon the outcome of the negotiation. Despite the significant differences between the renegotiation process and a typical administrative proceeding, a convincing argument has not been made for a policy of secretiveness with respect to these reports. Finally, contractors should be entitled to these reports not only to rebut adverse information that the Board may have received in response to its solicitation, but also to be apprised of complimentary information contained in the Board's files which will support their claims for favorable treatment. The inconvenience or delay that might possibly result from making this information available seems minimal, particularly when measured against the sense of foreboding and suspicion that accompanies an important governmental proceeding in which secret information is being used.

III. Tax Court Proceedings

Under the Renegotiation Act a contractor who is dissatisfied with the Board's determination of excessive profits is entitled to petition the Tax Court for a redetermination. Under the Act, "a proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." [101] Although the court's juris diction to determine the existence and extent of excessive profits is exclusive, its decisions are subject to limited review by the Courts of Appeals.[102]

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[101] 50 U.S.C. App. § 1218 (1964).

The opportunity afforded a contractor to seek a *de novo* redetermination in the Tax Court has been a feature of renegotiation legislation since the Second Renegotiation Act, adopted in 1944. It is doubtful that the renegotiation process would survive constitutional challenge were it not for the availability of some procedure of this type subsequent to the Board's determination. On the few occasions when federal courts have dealt with due process challenges to the manner in which renegotiation is conducted, they have consistently referred to the availability of *de novo* proceeding in the Tax Court as a cure for any infirmities that might otherwise exist on the Board level.[103] The Supreme Court, in dealing with the claim that administrative proceedings under the 1944 Act were a denial of due process, stated:

> As to the effect of the statute and of the course of action taken, we hold that the statute did afford procedural due process to the respective petitioners but that none of them made use of the procedure so provided for them. Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a redetermination of the excessive profits, if any, *de novo* by the Tax Court.[104]

Despite the unambiguous requirement of the Act that the Tax Court conduct *de novo* proceedings in renegotiation cases, it has been roundly and frequently criticized for not doing so.[105] Critics claim that as a consequence of the court's rules governing renegotiation cases, it merely reviews the Board's determination and fails to make an independent finding of its own. Moreover, it is further asserted that through the operation of its rules governing burdens of proof, the court has unfairly placed the burden upon contractors to prove that the Board's determinations are erroneous. Since records are not available to contractors regarding the Board's proceedings and deliberations, it is argued that a contractor can rarely meet this burden.

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[102] See 50 U.S.C. App. § 1218(a) (1964) which provides, *inter alia*, that "in no case shall the question of the existence of excessive profits, or the extent thereof, be reviewed, and findings of fact by the Tax Court shall be conclusive unless such findings are arbitrary or capricious." It further provides that the Courts of Appeals "shall have only the power to affirm the decision of the Tax Court or to reverse such decision on questions of law and remand the case for such further action as justice may require. . . ." Although this provision was enacted in 1962, its full implications are not known since there are not as yet any reported cases under it.

[103] Lichter v. United States, 334 U.S. 742, 791–92 (1948); Pownall v. United States, 159 F.2d 73, 74 (9th Cir. 1947), *aff'd.* 334 U.S. 742 (1948); Spaulding v. Douglas Aircraft Co., 154 F.2d 419, 426–7 (9th Cir. 1946).

[104] Lichter v. United States, 334 U.S. at 791.

[105] See note 62 *supra*.

Although critics have relied upon statistical data to support their claim that the Tax Court fails to provide a *de novo* proceeding,[106] the statistics available are neither conclusive nor persuasive. For example, the Board's most recent annual report notes that between 1951 and June 30, 1968 the Tax Court had "disposed" of 120 cases. It further states that "the Court upheld the Board's determination in 72 of the 120 cases. . . ." [107] This statement is rather misleading. In a large number of these cases the only issues before the court involved, *e.g.*, the statute of limitations, jurisdiction, exemption, etc. In another large number of cases the contractors were dissatisfied with the Board's refusal to permit certain charges (*e.g.*, advertising costs, officers salaries) to be taken as a cost of renegotiable business; in these cases the contractors typically stipulated to the Board's finding of excessive profits if the court found no error in the Board's disposition of the issue being contested. A review of the eleven cases [108] in which the court was required to redetermine excessive profits leads to quite different results than is suggested by the Board's annual report. In the eleven cases, the Court dealt with determinations for fifteen separate fiscal years. It reached the identical determination as the Board for five of those years; [109] it reached a determination less than the Board's for nine; [110] and found a higher amount than the Board in just one instance.[111] Although these statistics do not support the assertion that the Tax Court fails to provide a *de novo* redetermination, neither do they demonstrate that the court exercises the truly independent approach that was intended by Congress.[112]

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[106] *E.g.*, Koehler, *Renegotiation: Evidence and Burden of Proof in Appeal Proceedings*, 45 Va. 1, 19–20 (1959).

[107] 1968 Annual Report 13.

[108] See note 74 *supra*.

[109] LTV Aerospace Corp. v. Renegotiation Bd., 51 T.C. 369 (1969) fiscal 1952 and 1953); Baltimore Contractors, Inc. v. Renegotiation Bd., 43 T.C. 611 (1965) (fiscal 1952); Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962) (fiscal 1954); Vaughn Machinery Co. v. Renegotiation Bd., 30 T.C. 949 (1958) (fiscal 1952).

[110] Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856 (1958) (fiscal 1954); Martin Mfg. Co. v. Renegotiation Bd., 44 T.C. 559 (1965) (fiscal 1959 and 1960); Baltimore Contractors v. Renegotiation Bd., 43 T.C. 611 (1965) (fiscal 1951); North American Aviation, Inc. v Renegotiation Bd., 39 T.C. 207 (1962) (fiscal 1953 and 1954); Bay Co. v. Renegotiation Bd. 38 T.C. 535 (1962) (fiscal 1952); List & Clark Constr. Co. v. Renegotiation Bd., 35 T.C. 82 (1961) (fiscal 1954); Waltham Screw Co. v. Renegotiation Bd., 30 T.C. 949 (1958) (fisca 1951).

[111] Boeing Co. v. Renegotiation Bd., 37 T.C. 613 (1962) (fiscal 1952).

The severest criticisms of the Tax Court proceeding are directed at the allocation of burden of proof and certain pleading requirements which are similar to those ordinarily found in proceedings to review administrative determinations. For example, Rule 64 of the Tax Court Rules of Practice requires an aggrieved contractor's petition to contain:

> (b) (2) (iv) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Board or the Secretary in the determination of excessive profits. Each assignment of error shall be lettered.
>
> (b) (2) (v) Clear and concise lettered statements of the facts upon which the petitioner relies as sustaining the assignment of error. . . .

In addition, Rule 64(b) (2) (ix) requires the contractor to append to his petition a copy of the Board's order as well as a copy of the statement of facts and reasons, if one was furnished.

Besides these pleading rules, the court has adopted a burden of proof rule which many have argued undercuts the Congressional intent of providing a *de novo* redetermination. In Cohen v. Secretary of War,[113] the court held that the burden rested upon the petitioner to prove that he realized an amount of excessive profits less than that determined by the Board. In addition, it held that the Government carried the burden of proving that the petitioner realized excessive profits greater than the amount originally determined by the Board. This allocation of burdens was a straight application of Rule 32 of the Tax Court Rules which governs an ordinary proceeding involving a review of a determination of the Commissioner of Internal Revenue. In *Cohen*, the court explained its application of this rule to renegotiation proceedings as follows: [114]

> The legislation it is true, emphasizes the independence of proceedings for redetermination of excessive profits and refers to them as "*de novo*." There is little doubt that it was intended that the evidence taken and the judgment exercised should to no extent be limited by that of the Renegotiation Board or a Secretary.
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> . . . There is no reason to assume that Congress intended such problems [allocation of burdens of proof] in renegotiation cases to be incapable

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[112] The statistics for the Tax Court's performance under the predecessor statutes are equally inconclusive. In thirty-five cases involving determinations of excessive profits for forty-six separate fiscal years, the court reached the identical determination as was reached on the administrative level in twenty instances, found a lower amount of excessive profits in twenty-three, and greater amount in just three.

[113] 7 T.C. 1002 (1946).

[114] *Id.* at 1011.

> of solution; and there is every justification for the belief that, when jurisdiction in such cases was entrusted to the Tax Court, it was on the assumption that its procedure and practice would be adopted as far as reasonably consistent with renegotiation proceedings.

Apparently the judges of the Tax Court see no inconsistency between the requirements imposed by these rules and the dictates of the statute. In a letter to the Joint Committee on Internal Revenue Taxation, dated May 15, 1961, Chief Judge Murdock stated: [115]

> The trial before the Tax Court in a renegotiation case is a de novo proceeding, as the law requires. It is not a review of the action of the Renegotiation Board. The Tax Court decides each case solely on the basis of the evidence introduced in the trial before it. . . .
>
> The Tax Court has explained in its rules and opinions that the contractor must assume the burden of the moving party in the proceeding and if the proof before the Tax Court is inadequate to support an independent determination, then of course the Court has to leave the parties as it found them, that is, it cannot change the determination of the Renegotiation Board. See Rule 32 and *Nathan Cohen,* 7 T.C. 1002.

Despite this statement of the court's attitude, the language found in a number of opinions strongly suggests that the court tends to view these cases as proceedings to review rather than as *de novo* proceedings. The opinions show a penchant by the Judges of the court to require a petitioner to prove that the Board's determination was "erroneous" or that the "Board has failed to give proper consideration and weight in reaching its determination to all evidence favoring petitioner. . . ." [116] If these statements accurately reflect the court's approach to renegotiation cases, then the intent of the Act is being frustrated. Moreover, if the court actually expects a contractor to demonstrate the errors committed by the Board, it will in many cases be placing him under an impossible burden since the records of Board proceedings are not available, nor does the Board issue opinions explaining its decisions. In fact, one of the justifications given by the Board for its refusal to permit discovery of its files or to publish opinions is the availability of the *de novo* Tax Court proceeding in which the Board's proceedings presumably are immaterial.

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[115] 1962 Jt. Comm. Rep. 12.

[116] See, *e.g.*, Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856, 859 (1968); Vaughn Machinery Co. v. Renegotiation Bd., 30 T.C. 949, 958–59 (1958). *But see* Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 52 T.C. 152, 154 (1969):

> . . . The Renegotiation Act imposes upon the Board the responsibility of determining the reasonableness of a contractor's profits by the exercise of discretion, will, or judgment to which no presumption of correctness attaches when the contractor seeks a de novo hearing in this court.
>
> . . . This Court has consistently taken the posiiton that because of the de novo character of the renegotiation cases in this Court the proceedings and records of the Renegotiation Board are not relevant or material to this Court's determination of the amoun of excess profits.

The issue we attempted to deal with was the degree to which the court actually treated these proceedings as *de novo* despite the thrust of its rules governing pleading and proof. A review of close to fifty opinions of the Tax Court leads to inconclusive results. As noted above, the court has not slavishly accepted the Board's determinations. On the other hand, the opinions seldom provide a very thorough explanation of the reasoning process engaged in by the court. Despite its rule requiring a contractor to prove that the Board's determination was erroneous, the court has frequently entered an order for a reduced amount with the bare explanation that upon review of the facts it finds no excessive profits or excessive profits in a particular amount.[117] Findings of this sort suggest that proceedings are treated as *de novo* and that the court may be disregarding its published rules. On the other hand, in a number of cases the court has reviewed the facts in the case and entered an order identically the same as the Board's with the explanation that the contractor failed to prove that its profits were not excessive or that the Board's determination was erroneous.[118]

A further difficulty that occurs from a mere reading of these opinions is the impression one receives that the proceedings were perfunctory. To a considerable degree this is the result of the format the Tax Court uses for its opinions. Typically, they start with a section entitled "Findings of Facts" which is a description of varying length and detail usually concerned with the nature of the contractors' business, the contracts performed for the government during the years under consideration and various financial data for the same period. The next portion is entitled "Opinion" and varies greatly from opinion to opinion with respect to the degree of explanation and detailed analysis provided. A careful reading of these opinions left me with the overall impression that the evidentiary hearings conducted by the Tax Court were generally perfunctory and that the cases were principally presented on stipulated facts. Apparently this is an erroneous impression. I have been advised that in almost all of the cases in which the specific issue being litigated is the excessiveness of the contractor's profits, the records are quite extensive and are the product of full trial proceedings. This was confirmed by perusing the transcript of a case which seemed from the opinion to have had a sparse trial and to have been before the Court largely on a stipulated record.[119] In fact, the trial of this particular case took over forty full days and resulted in thousands of pages of trial transcript and exhibits. The problem, apparently, was the failure of the opinion to reflect the extent of the proceedings.

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[117] See, *e.g.*, Offner Prod. Corp. v. Renegotiation Bd., 50 T.C. 856 (1968); Martin Mfg. Co. v. Renegotiation Board, 44 T.C. 559 (1965); List & Clark Constr. Co. v. Renegotiation Bd., 35 T.C. 823 (1961).

[118] See, *e.g.*, Beets and Yeckel v. Renegotiation Bd., 38 T.C. 677 (1962); Vaughn Machinery Co. v. Renegotiation Board, 30 T.C. 949 (1958).

A more serious failing in the Tax Court opinions is the lack of any extensive consideration of the statutory factors or detailed explanation of their appropriate application. Seventeen years ago it was noted that "decisions of the Tax Court are of doubtful value as precedents [for determining the proper application of the statutory factors] since it is often impossible to determine the relative weight given to the various factors considered." [120] There has been little, if any, descernible improvement in the opinions published since that view was expressed. With few exceptions, the typical Tax Court opinion contains a formalistic statement of the statutory factors together with a conclusionary statement as to whether each factor weighed favorably or unfavorably for the contractor, followed by an unexplained finding of the amount of excessive profits. Occasionally, the end result is justified on the ground that the contractor failed to sustain his burden that his profits were reasonable or that the Board erred. In a number of cases, particularly those decided in the forties and early fifties, the Court merely stated it had considered all the statutory factors.[121]

Even in those few instances where the court has published a rather detailed and relatively well-reasoned opinion, the explanation of the weight given to each of the factors or the criteria that it uses in arriving at a favorable or unfavorable determination as to each factor is of little, if any, precedential value.[122] Rarely, if ever, does the Court rely upon prior decisions to support its application or construction of the statutory criteria, nor are there any strong indications of the type of evidentiary approach that the Court finds most persuasive. The short answer may simply be that determining excessive profits through the application of the statutory criteria is of such an ephemeral nature as to make it virtually impossible to give greater description or content to the analytical process being used. Clearly, the opinions from case to case do not appear to be of great assistance to the judges of the court since it is rare that prior opinions are cited as precedent to support the application of the statutory factors or the ultimate finding. The loss incurred because of the court's failure to articulate more fully its mode of analysis affects the Renegotiation Board as well as contractors. Presumably, the Board would treat as at least persuasive the standards applied by the court if they were more precisely articulated.

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[119] Boeing Co. v. Renegotiation Bd., 37 T.C. 613 (1962).

[120] Braucher, *The Renegotiation Act of 1951*, 66 Harv. L. Rev. 270, 299 (1952).

[121] See, *e.g.*, Pechtel, Pechtel and Chester v. United States, 18 T.C. 851 (1952); Rosn v. WCPAB, 17 T.C. 445 (1951); Armstrong v. WCPAB, 15 T.C. 625 (1950); W. Tip Davis C v. Patterson, 12 T.C. 335 (1949); Supply Division, Inc. v. WCPAB, 9 T.C. 1103 (1947).

[122] See, *e.g.*, LTV Aerospace Corp. v. Renegotiation Bd., 51 T.C. 369 (1968); North Ame can Aviation Co. v. Renegotiation Bd., 39 T.C. 207 (1962); Boeing Airplane Co. v. Reneg tiation Bd., 37 T.C. 613 (1962).

ADDENDUM

On March 10, 1970 the Court of Appeals for the District of Columbia rendered its decision in Grumman Aircraft Engineering Corp. v. The Renegotiation Board, discussed at pp. 31–32 of the report. The Court of Appeals reversed the district court's order dismissing the suit on the Board's motion for summary judgment. The opinion by Chief Judge Bazelon rejected the Board's claim that under the Information Act the documents requested by Grumman (opinions and orders involving fourteen other aircraft manufacturers and performance reports pertaining to Grumman) were exempt from disclosure because they contained privileged or confidential financial information.

With respect to orders or opinions of the Board concerning third parties, the Court held that Grumman was entitled to receive such documents "after appellee [the Board] has made suitable deletions." (Slip opinion at p. 5). The Court further suggested to the Board that in the future it might delete identifying detail from all of its orders and opinions and then make them "available to public inspection as a matter of course." In the Court's view "this procedure will fulfill the statutory mandate by exposing to public scrutiny the agency's discharge of its functions while protecting the privacy of the persons involved in the disposition of individual cases." (*Id.*)

With respect to performance reports relating to Grumman, the Court held that they were subject to disclosure after *in camera* inspection by the district court to determine whether they contain confidential commercial or financial information concerning third parties. Any such information contained in a report is to be deleted prior to disclosure; if deletion is not feasible, a report containing such data apparently would not be subject to disclosure.

ADDITIONAL REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

NOTE:

In a number of instances the Administrative Conference has undertaken investigation of agency procedures with the full cooperation of that agency. In the course of the study certain shortcomings in the agency procedures have come to light. As a result the agencies have informed the Administrative Conference of their desire to initiate corrective action without the necessity of there being formal Conference action.

The following report on "Remission and Mitigation of Forfeitures in the Department of Justice" is illustrative. In a letter from the Executive Assistant to the Attorney General dated June 12, 1969, following an extensive investigation of the above subject matter the Administrative Conference was advised

> "the Department [of Justice] has assented to the recommendation in its entirety, has implemented it to the extent it can do so without promulgating new regulations, and is now in the process of developing the regulations necessary to put the balance of the recommendations into effect."

Printed here is the report prepared for the Committee on Informal Action which resulted in this change in procedures in the Department of Justice.

REMISSION AND MITIGATION OF FORFEITURES IN THE JUSTICE DEPARTMENT

A REPORT FOR THE COMMITTEE ON INFORMAL ACTION

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I. SOME HISTORY

The forfeiture laws of the United States are related to those primitive conceptions under which an instrumentality which injured another or was used in the performance of a crime was itself deemed to be, in some sense, culpable.[1] The concept of the culpability of inanimate or nonhuman objects appears, inter alia, in Mosaic law,[2] in the law of ancient Athens,[3] and in the medieval law of deodand.[4] If it is mildly surprising that Blackstone[5] attested to the continuing validity of these notions in eighteenth century England, it is remarkable that the Supreme Court of the United States has rejected,[6] in the twentieth century, what it described as "formidable" due process arguments on the basis of these primitive and basically animistic conceptions.

The early customs laws of the United States provided for the imposition of monetary penalties, sometimes called forfeitures, upon persons violating them.[7] Goods imported without payment of required duties were made forfeitable to the United States,[8] and in some cases the vessels or carriages bringing those goods into the country were also made forfeitable.[9] Several early statutes made vessels used in piracy [10] and the slave trade [11] forfeitable either to the United States or to private parties.

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[1] See Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510–511 (1921).

[2] 21 Exodus 28.

[3] Holmes, The Common Law 10 (Howe ed. 1963). *Cf.* Plato, Laws Bkix 874.

[4] II Pollack & Maitland, History of English Law 473–474 (2d ed. 1898).

[5] 1 Blackstone, Commentaries on the Law of England 290–292 (1765).

[6] Goldsmith-Grant Co. v. United States, supra.

[7] Act of July 31, 1789, 1 Stat. 29.

[8] Act of July 31, 1789, supra.

The United States customs and other revenue laws have extended the application of the forfeiture device not only to goods which were subject to uncollected duties, but also to vessels, carriages, sleighs, etc. used to transport dutiable goods [12] and to casks, packages, etc. in which they were hidden,[13] and even to goods in the same room or location as dutiable goods.[14] While the wide scope to which the forfeiture device has been extended obviously embodies the conscious use of the threat of forfeiture as a deterrent, procedural objections to forfeiture applications have frequently been defended on the rationale of the medieval law of deodands.[15]

Recognition that substantial injustice would occur without some effort at protecting the property interests of innocent persons probably was responsible for mitigation and remission provisions which have been found in American statutory forfeiture law since the First Congress. That Congress, in 1780, provided for the mitigation or remission of any "fine, penalty or forfeiture" including forfeitures of "vessels, goods, wares or merchandise." [16] The procedure established in that act provided for an inquiry "in a summary manner" by a federal judge who would then transmit the facts to the Secretary of the Treasury who was given mitigation and remission power (and power to direct the cessation of judicial proceedings for forfeiture) if the fine, penalty or forfeiture was incurred without "wilful negligence of any intention of fraud." A similar mitigation and remission provision appears in the Act of March 3, 1797 [17] whose mitigation and remission provisions were adopted by reference in a number of subsequent customs enactments.[18]

Concern with the impact of vehicle forfeiture upon common carriers resulted in the creation of an exception for common carriers embodied in the customs law of 1866, as long as the owner's agent in charge of the vehicle was not a "consenting party, or privy to" the illegal importation or transportation for which forfeiture would otherwise be imposed.[19] This common carrier exception has been continued and finds expression in the Tariff Act of 1930.[20] Innocent holders of property interest other than common carriers, however, were protected only through a remission power vested in the Secretary of the Treasury.[21] The 1935 Act repealing Titles I and II of the National Prohibition Act contained provisions for mitigation and remission, as did earlier acts, but instead of vesting this power in a Cabinet officer as did the earlier acts, it vested that power in the courts.[22] The Act expressly dealt with the rights of all of the innocent holders of interests in seized property: it contains remission and mitigation standards designed to protect them. In subsequent forfeiture laws, Congress has reverted to the earlier practice of vesting mitigation and remission power in a Cabinet officer.[23]

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[9] The Act of July 31, 1789 makes such vessels forfeitable but only if their value does not exceed $400.

[10] Act of March 3, 1819 § 4, 3 Stat. 510, 513.

[11] Act of March 22, 1794, 1 Stat. 347; Act of May 10, 1800, 2 Stat. 70; Act of March 2 1807, Stat.

[12] Act of July 18, 1866, 14 Stat. 178; Act of July, 1866 § 12, 14 Stat. 151–152; Act of Jul 18, 1866 § 3.

[13] Act of July 18, 1866 § 3 supra.

[14] 26 U.S.C. § 7301.

[15] E.g., Goldsmith-Grant Co. v. United States, supra.

[16] 1 Stat. 122.

[17] 1 Stat. 506.

[18] E.g., Act of March 1, 1823 § 35, 3 Stat. 729; Act of April 20, 1818 § 25, 3 Stat. 433.

Today forfeitures are used on a wide scale in the administration of a host of laws.[24] The Congress has explicitly recognized that the forfeitures are imposed on vehicles used to transport narcotics for the pragmatic purpose of penalizing professional criminals in their pocketbooks:

> "Vessels, vehicles, and aircraft may be termed the operating tools of dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs."[24a]

II. FORFEITURE REMISSION AND MITIGATION

When a vehicle or other property is seized by an enforcement agency in a circumstance which subjects that property to forfeiture, the value at which the property is appraised by the enforcement agency affects the procedure which will be used to effect the forfeiture. If the seized property is of a value in excess of $2,500, the forfeiture must be performed judicially. If it is of a value of $2,500 or less, the forfeiture is performed administratively by the seizing agency unless a claimant to that property, by filing a claim and cost bond, demands a judicial forfeiture proceeding. Judicial forfeiture proceedings are instituted by the U.S. Attorney in the district in which the seizure was made.

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[19] Act of July 18, 1866, supra.

[20] 46 Stat. 590, 751–752.

[21] Tariff Act of 1930 § 618, 46 Stat.

[22] 49 Stat. 872, 878.

[23] E.g., Contraband Transportation Act, 53 Stat. 1792 (1939), 26 U.S.C. § 5862.

[24] Contraband Transportation Act, 49 U.S.C. § 782; National Firearms Act, 26 U.S.C. § 5862; Internal Revenue Code, 26 U.S.C. §§ 7301, 7302, 7303; the customs laws, 19 U.S.C. § 1595a; liquor laws, 18 U.S.C. § 3615.

[24a] H. Rep. No. 1054, 76 Cong., 1st Sess. 2 (1939).

Agencies which might seize a vehicle or other property in circumstances which would subject it to forfeiture would include the Bureau of Narcotics and Dangerous Drugs, the Treasury Department's Alcohol and Tobacco Tax Unit, the Secret Service, the Federal Bureau of Investigation, and the Customs Office. Decisions as to whether forfeiture should be sought are made by the seizing agency or by the local U.S. Attorney, and are generally based upon the strength and sufficiency of the evidence which would support the forfeiture.

Mitigation and Remission of Forfeitures—Persons having an interest in seized property may seek remission or mitigation of the forfeiture by petitioning the seizing agency in cases involving property having a value of $2,500 or less, or by petition to the U.S. Attorney General in cases in which the seized property has a value in excess of $2,500, or in cases involving property of lesser value in which a claim and cost bond is filed.

Almost all of the Justice Department's forfeiture remission and mitigation activities involving property subject to judicial forfeiture are now centered in the Narcotics and Dangerous Drugs Section of the Department's Criminal Division. That Section deals with forfeitures imposed under liquor, gambling, narcotics, counterfeiting, and firearms laws. It also deals with forfeitures of vehicles (of the requisite values) imposed under th customs laws. (Forfeitures imposed under the Food and Dru laws and customs forfeitures (other than vehicles) and penaltie not falling within the above categories are administered in th Administrative Regulation Section.)

Forfeiture Remission and Mitigation in the Justice Depar ment's Narcotics and Dangerous Drugs Section.—Mitigation an remission cases originate with a petition for such action filed the owner of a property interest in the seized property with th U.S. Attorney who is responsible for the prosecution of the fo feiture proceeding. The U.S. Attorney then requests the seizi agency to conduct a "field investigation." The investigation i quires into the validity of the petitioner's property interest, t circumstances under which it was acquired, the record and rep tation of the person whose conduct subjected the property question to seizure, the extent and kind of inquiries made the petitioner into the record and reputation of that person, a the answers received by the petitioner, and possibly other information deemed relevant by the seizing agency. The seizing agency concludes its report with its recommendation as to whether remission or mitigation should be granted, and forwards its report to the U.S. Attorney. The U.S. Attorney is expected to review the investigation report of the seizing agency and to add his own recommendation as to the disposition of the remission or mitigation petition. It is said that the recommendations of the seizing agency and of the U.S. Attorney principally serve to engender a sense of responsibility for the accuracy of the report in the persons making those recommendations. The recommendations themselves do not carry much weight in the Section's own determinations of the merits of petitions coming before it. The U.S. Attorney forwards the seizing agency's field investigation report and recommendation, together with his own recommendation to the Justice Department's Narcotics and Dangerous Drugs Section in Washington.

The Narcotics and Dangerous Drugs Section is composed of 10 attorneys including the Chief and Deputy Chief of that Section. Forfeiture remission and mitigation work in the Section is performed principally by two attorneys and the Deputy Chief who reviews their work. It is contemplated that other Section attorneys will also perform remission and mitigation work from time to time, primarily to develop and to maintain experience within the Section in that type of work. During fiscal 1967–68, however, the two attorneys specializing in remission and mitigation work handled all of the Section's remission and mitigation petitions. These two attorneys are said to spend approximately 35% of their time on that work. They are involved also in other matters relating to forfeitures in at least some of their other work, such as, for example, considering questions about the validity of searches which have led to seizures.

During fiscal 1967–68 the Section received 210 petitions for remission or mitigation, acted on 201, received 31 offers in compromise and acted on all of them. It is estimated that the Section granted remission in about two-fifths of the petitions which came before it in fiscal 1967–68. It granted mitigation in the case during that year; and one mitigation grant a year is said to be a good average figure for mitigation grants. For the past four months the Section's caseload has been: July: 3 petitions, 6 denials, 2 grants, 3 offers in compromise accepted, 2 offers in compromise denied; September: 10 petitions, 5 denials, 3 grants, 2 offers in compromise accepted; October: 6 petitions, 7 denials, 6 grants, 2 offers in compromise accepted. It is said concerning the figures for the last four months that a single petition may appear as both granted and denied in cases in which both an innocent lienholder and a guilty owner seek remission in the same petition. Almost invariably the petitions coming before the Section concern motor vehicles valued in excess of $2,500 and ranging up to $8,000 or $9,000. Petitions involving property worth less than $2,500 which would come before the Section as a result of the appeal bond procedure are rare; during fiscal 1967–68 they amounted to approximately 20–25 in number. Most of the Section's petitions involve automobiles. Truck petitions are rare, since most trucks seized for law violations are older pick-up trucks valued at less than $2,500. During fiscal 1967–68 the Section was concerned with only 5 trucks (4 pick-up trucks and 1 van). It is even more rare for the Section to be concerned with property other than motor vehicles. The Section did consider one petition involving a motor vessel valued at approximately $40,000 during fiscal 1967–68. It also considered a petition involving 5 tires. Over the years the Section has handled the forfeiture of one aircraft, and, in the recollection of the Deputy Chief of Section, 3 parcels of real estate.

The work of the review attorney involves a review of the investigation report of the seizing agency and recommending a decision of the case upon the basis of rules used by the Section in the determination of cases. In cases in which the attorney deems the investigation report deficient or in which the basis for the report's conclusions is not adequately revealed, he may make further inquiries of the seizing agency in an attempt to clarify the points at issue. Additional information is requested in approximately 10% of the cases. Thus, for example, the Section sometimes receives investigation reports which recite that the person on whose vehicle the petitioner holds a security lien possesses a "reputation" as a violator of the liquor laws or the laws against "commercial" crime, but without specifying the basis for that reputation. It also appears that some law enforcement offices will refer to persons as possessing a "reputation" as a law violator without adequate grounds. The Section attorney, therefore, feels some obligation to inquire into the bases upon which statements about reputation are made in the seizing agency's investigation report. This can lead to complexities when, for example, the reputation statement is made by a local law enforcement agency upon the basis of informers or other confidential sources. In such cases, however, the Section attorney may check with the seizing agency to see what action the local law enforcement agency took on the basis of the confidential information. Its failure to have acted may suggest an inference that the agency did not really credit that information as trustworthy. Information is never sought from a source other than the seizing agency.

When the staff attorney completes his review of the seizing agency's field investigation report and completes any other investigation which he may himself conduct, he prepares a recommendation for decision on the remission or mitigation petition. The recommendation is usually typed (single space) on a legal size paper. It states the facts "found" by the Section attorney on the basis of the investigation report and other investigation or inquiry conducted by him in sufficient detail so that the recommendation under the standards followed by the Section is usually obvious. Following the lengthy fact statement is a short statement of recommendation, usually without explanation. The staff attorney also prepares a proposed "decision" in the form of a letter for the signature of the Section Chief.

The completed recommendation and unsigned decision are transmitted to the Deputy Chief of Section who reviews them. The Deputy Chief of Section discusses the cases with the staff attorneys submitting their recommendations to him when he disagrees with their conclusions. Usually the Deputy Chief prevails in such discussions, but were a disagreement to be unresolvable the Deputy Chief would add a short memorandum of his own to the recommendation prepared by the staff attorney. The Deputy Chief's memorandum would probably merely state the fact of his disagreement and the reasons for it. It would not attempt to be an exhaustive analysis of the problem. The Deputy Chief's view would prevail—either as a result of conversations with the staff attorney or as a result of the Section Chief's decision in an estimated 95% of the cases in which a disagreement occurred.

After the Deputy Chief has reviewed the recommendation and decision proposed by the staff attorney and either ratified it or effected its change through discussion or added his own differing recommendation, the recommendation and proposed decision are transmitted to the Section Chief who decides the remission or mitigation case by delegation from the Attorney General. The decision of the Chief of Section will normally follow the proposed decision and supporting recommendations of the Deputy Chief of Section and his staff attorney. The Chief of Section has not disagreed with the Deputy Chief on a remission or mitigation case since the Narcotics and Dangerous Drugs Section was assigned the task of deciding forfeiture remission and mitigation petitions last spring. In cases in which the Deputy Chief of Section and the staff attorney would disagree, however, the Section Chief is called upon to participate more actively.

Although the formal structure of decision-making appears as outlined above, there appears to be informal overlapping of offices as the process is actually carried out. Thus the Deputy Chief of Section may discuss a difficult case with the staff attorney before the latter has drafted his recommendations, and in some difficult cases the Section Chief may also enter the discussion even before the initial recommendation has been prepared by the staff attorney.

The final decision is made by the Section Chief in the form of a letter to the U.S. Attorney. As noted, the staff attorney prepared a proposed letter decision at the same time that he prepares his supporting memorandum of recommendation. When the Section Chief sends the letter decision to the U.S. Attorney, he also encloses a copy of the memorandum of recommendation in order to explain the basis for decision to the U.S. Attorney who informs the petitioner orally of the Section's decision and of its basis. The petitioner does not see the memorandum of recommendation.[25]

Petitioners request conferences "not too frequently" with Section attorneys. Usually these conferences are requested by petitioners or attorneys who are not familiar with the remission and mitigation procedures of the Section. The specialist attorneys usually know that little can be accomplished by a conference, since the decisions are made principally on the investigation reports of the seizing agencies. They will telephone, once in a while, in cases in which they have been left in doubt as to the reason for an adverse determination by the U.S. Attorney with whom they have been dealing. The Section, in such cases, explains the reasons for its decision to the inquiring attorney.

Appeals—The pricipal method of appeal from an adverse determination of the Section of Narcotics and Dangerous Drugs would be in the form of a petition for reconsideration. Petitioners for reconsideration are naturally handicapped in seeking such reconsideration to the extent that they do not know the grounds for the initial denial of their claim. They are suppose to be informed by the U.S. Attorney about the grounds for denial who, in turn, is informed by the memorandum of recommendation which is sent to him but which is not shown to the claimants. It seems likely that if the U.S. Attorney is not overly secretive that the claimants in most cases do obtain adequate enough idea about the basis for the denial of their claims that they will know the issue which determined the case against them. Attorneys in the Section will also discuss the reasons for a petition denial, and some attorneys do telephone staff attorneys to discover reasons for denial in cases where the U.S. Attorney was not informative. Persons unfamiliar with the Section's procedures, however, may (i) be unaware of their right to seek reconsideration; and (ii) be unaware that they may clarify the reasons for the denial of their petition by talking directly with the reviewing attorney. Both of these problems could be eliminated if the Section informed claimants routinely of their right to seek reconsideration and gave claimants precisely reasoned statements in writing why their petitions were denied. The latter practice is followed in the Bureau of Narcotics and Dangerous Drugs and there seems to be no reason why the practice cannot be followed in the Section.

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[25] Placing the reasoning of decisions in "memoranda of recommendations" may be designe to avoid the application of the provisions of the Public Information Act, 5 U.S.C. § 55 (a) (2) (A) (1967) which require "final opinions" to be made "available for public inspection.

The Standards.—As observed above, the Section of Narcotics and Dangerous Drugs decides remission cases on the basis of its internal guides. It does not decide on the basis of precedent cases. The reason the Section does not use precedent appears to be the difficulty and expense of locating apt precedents. The office has no indexing system and could not locate apt precedent cases if they were sought. The Deputy Chief of Section explained that he has two lawyers and a secretary available for the bulk of the remission work, and that such a limited staff could not cope with the indexing task which would be an essential part of a precedent system. The procedure under which decisions are made with reference to the Section's internal guides but not with reference to its past decisions seems understandable in the circumstances and probably is as fair as an elaborate precedent system.[26]

Standards employed in deciding remission and mitigation cases.—The Narcotics and Dangerous Drug Section has not published any regulations which disclose the standards which it uses in deciding remission and mitigation cases. It freely advises any inquirer, however, that it follows the provisions of 18 U.S.C. § 3617(b) in deciding remission and mitigation petitions concerning property seized for violation of the liquor laws and that it follows a similar but slightly modified standard in dealing with remission and mitigation petitions concerning property seized for other law violations. The principal modification, it states, is that the reference in 18 U.S.C. § 3617(b) to record or reputation for violating the liquor laws is changed to a record or reputation for the commission of "commercial crime". The Section also states that it looks to the court decisions interpreting 18 U.S.C. § 3617(b) as further guides to its decisions.

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[26] It might be observed here that the issue of negligence is generally decided by reference to a single "prudent man" standard; and no attempt is generally made to influence the decision in one case by what was decided on similar facts in an earlier one.

The Section, however, distinguishes between the standards which must be known in order to comply with the Department's policies governing lending and auto and truck leasing institutions and the standards which it uses to decide remission petitions. It is the former to which it is primarily referring when it states that the governing standards—for both liquor law and other types of remission cases—are adequately stated in the provisions of 18 U.S.C. § 3617(b). The latter, the standards which the Section itself uses to decide whether to grant or to deny petitions for remission, are not publicly stated at all, but in the Section's view, the publication or other form of public disclosure of those standards would not serve a useful purpose. The distinction between the external and internal standards may be partially premised on the ground that the internal standards are always narrower than the external standards; and adherence by the Section to the internal standards will not result in denial of remission to financial or other institutions which have complied with the external standards.

The standards which are published somewhere.—The most public of the Section's remission standards is 18 U.S.C. § 3617(b) which is used by the Section as its basic guide to remission decision-making. That statute by its terms governs judicial grants of remission and mitigation with respect to vehicles and aircraft seized for violation of the liquor laws. The statute provides as follows:

> In any such proceeding the court shall not allow the claim of an
> claimant for remission or mitigation unless and until he proves (1) tha
> he has an interest in such vehicle or aircraft, as owner or otherwis
> which he acquired in good faith, (2) that he had at no time any knowl
> edge or reason to believe that it was being or would be used in the viola
> tion of laws of the United States or of any State relating to liquor, an
> (3) if it appears that the interest asserted by the claimant arises out
> or is in any way subject to any contract or agreement under which ar

> person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

In remitting forfeitures administratively, the Section holds claimants to property seized under the liquor laws to the standards of 18 U.S.C. § 3617(b). As stated above, claimants to property seized for violations of narcotics, firearms, etc. laws are held to a slightly modified version of 18 U.S.C. § 3617(b) under which the statute's reference to a record or reputation for violating laws "relating to liquor" is changed to a record or reputation for "commercial crime". Despite the absence of any published regulation embodying its remission standards either in liquor law cases or in narcotics, firearms, or other cases, the Section will readily inform any inquirer that the governing standard is either 18 U.S.C. § 3617(b) or a modification of it; and the Section will probably readily disclose that the critical record or reputation in non-liquor cases concerns "commercial crime". The Section may also refer an inquirer to 31 C.F.R. § 15.1 which contains a statement of Treasury policy concerning the latter's automobile remission and mitigation decisions which explicitly states that 18 U.S.C. § 3617(b) is used as a decisional guide but that in considering a person's record or reputation, the Treasury does not "limit itself to crimes involving the liquor laws." In other regulations,[27] however, the Treasury specified "commercial crime" as the relevant area in which a noncomplying and unchecked record or reputation will disqualify a subjectively innocent holder of a property interest in seized property from obtaining remission or mitigation. Since the Treasury regulations are published and since an attorney researching forfeiture procedures would probably uncover them, and, on inquiry find that they also stated the policy of the Narcotics and Dangerous Drugs Section, they are here somewhat generously called "published" standards.

The public but unpublished standards.—Those unpublished decisional standards which are stated in the Section's internal decisional rules, but which are publicly revealed upon inquiry are here described as public but unpublished standards. The basis guide to remission decisions, 18 U.S.C. § 3617(b), distinguishes two different types of claimants: (1) a person whose interest "arises out of or is in any way subject to any contract or agreement" under which a person with an objectionable record or reputation has a right in the property in question; and (2) a person whose interest does not so arise. The former would, on its face, include banks and other lending institutions and auto and truck rental firms, while the latter would include lenders of automobiles or other property in noncommercial situations.[28] Despite the words of the statute, the Section distinguishes a third category intermediate between the noncommercial bailor and the holder of a security interest, and that is the commercial bailor who literally would fall within the first category. Here the Section rules require compliance with the record or reputation check provisions by the bailor-for-hire—if the bailment is for a long period, but not if the bailment is for the short term of the usual auto rental. The separate categorizatio of commercial bailments is probably best described as a publi but unpublished standard, because the Section freely advise inquirers that bailments-for-hire are separately dealt with and indeed, assumes that the auto and truck rental industry is awar of their separate categorization, and because the separate cate gorization is suggested nowhere in the statutes or in any regula tion. Since the Section will probably inform an inquirer tha a reputation for law violation may be lost with the passage time and that a record which is sufficiently old will be disr garded, but no statute or regulation which is published or ope to public inspection so states, these matters probably may al be described as part of the Section's public but unpublish standards. However, since the caselaw under 18 U.S.C. § 3617(suggests the healing action of time upon records and reputatio for purposes of judicial remission and mitigation, those me bers of the affected public who know that the Section asse that it uses caselaw under 18 U.S.C. § 3617(b) as decisio guides would be alerted to the eroding of the record and re tation disability over time.

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[27] 26 C.F.R. §§ 172.9, 172.38(d).

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[28] This interpretation of 18 U.S.C. § 3617(b)'s distinction requires reading "contract agreement" as excluding oral or implied-in-fact "contracts or agreements" under whic borrower is bound to return a borrowed automobile or other borrowed property. Strictly, ery loan of property involves an understanding between the lender and borrower that property will be returned; every bailment, whether commercial or noncommercial thus inv a "contract or agreement.'

The internal standards.—The Section assertedly maintains a set of rules governing its decision of remission and mitigation cases. I am not entirely sure whether any or all of these rules are written. In general, these rules follow the outline of 18 U.S.C. § 3617(b), but provide more detailed criteria for decision than is found in that statute. Some of the concepts embodied in the Section's decisional rules which do not appear in the statute nevertheless are disclosed by the Section to those making inquiry, and some of these have been described as public or published standards. Other provisions of the Section's decisional rules, however, are not disclosed at all. Examples of the latter include the demarcation point used by the Section to distinguish between short and long term commercial bailments, and the length of the time period which must elapse before a criminal record or reputation loses its relevance for remission and mitigation decisions.

Standards for Mitigation and Offers in Compromise.—Offers in compromise are considered on the basis of the "cold record" such as where the record reveals a serious question about the validity of a seizure. Mitigation, on the other hand, involves "entirely different considerations" which are said to be "wholly compassionate" ones. Nonetheless, the one mitigated case of last year involved a company credit union which, on the basis of an alleged indirect check on the morals of a borrower, extended credit to him. The indirect check was asserted to exist because the company allegedly checked the morals of its employees before hiring them. Doubt about the plausibility of the claimant credit union's claim was resolved by mitigating the amount returned to the credit union. (Whether the question of plausibility concerned the credit union's use of an indirect check as compliance with the Section's norms or whether the plausibility question concerned the assertion by the credit union of the fact of its reliance is not clear). The credit union case does not appear to fit the "compassionate" norm asserted. It appears that mitigation is awarded in very rare instances in cases which do not fit exactly within the remission rules, but the mitigation criteria remain unclear to me.

The varying openness of the standards. (a) *In general.*—The fact that the Narcotics and Dangerous Drugs Section does not publish its "public" standards probably does not harm the large lending institutions which are probably aware of them. The informal network of communication between the Section and the large lending institutions probably informs those institutions about those policies of which the Section wishes them to be aware.

Small lenders may not be aware of the Department's policies about record and reputation checks at all. They are on notice of the need to make such checks in the case of liquor-law violations because of the statutory provisions of 18 U.S.C. § 3617(b). They are on notice of the Treasury's policy of incorporating 18 U.S.C. § 3617(b) as a decisional criterion in which the reference to record or reputation for liquor-law violations is replaced by a reference to record or reputation for other types of law violations because of the regulation promulgated in 26 C.F.R. § 15.1. They may be on notice that the Treasury substitutes "commercial crime" in the standard in non-liquor cases as a result of other regulations. They are not on notice of any Justice Department policy in non-liquor cases except as notice can be imputed to them as a result of inferences which could be imputed to one who had notice of similar Treasury policy. Under its present no-publication policy, the Justice Department is denying remission to claimants because of their failure to observe a standard (involving the making of record and reputation checks) of which they were both ignorant and were not on notice. The theory of the Department, in denying remission and mitigation in such cases, must be that the notice which would be imputed to them of Treasury policies because of their CFR publication in some way also imputes to them the unpublished Justice Department policies. The need to adhere to such an awkward theory could easily be avoided by publication of Justice Department policies.

(b) *The co-existence of public and internal standards.*—Th coexistence of separate published, public but unpublished, an internal standards will not result in substantive injustice in th sense that a person is penalized for violating an internal standard although he had not broken the public standards as lon as the internal standards are narrower than the public ones. T a large, but not necessarily universal extent, that situation ma prevail here. The separate categorization of auto and truc rental agencies is probably best described as part of the "public standards because the Section freely advises inquirers that thos agencies are separately dealt with. For the same reason th differentiation between long and short term rentals is probabl best described as part of the "public" standards. The demarcatio point separating short and long term leases, however, is pa of the internal standard. To the extent that an auto-rent agency would reasonably believe a lease to fall within tl short-term category and thereby omit the record and reputation check, the auto-rental agency's penalization for its omission would appear unjust. In such a case the internal standard would trap the innocent. It is conceivable that some such cases have in fact occurred; nevertheless it is likely that in many cases auto-rental companies are aware that they are taking a chance when they fail to make record and reputation checks on leases which are longer than a few days.

Would it be possible to eliminate the coexistence of the two standards by publicizing the dividing line between short and long term leases? The section thinks that the result would be to encourage the auto-rental firms to protect themselves by substituting several consecutive short term leases for long term ones. But this does not appear to be a realistic answer. The trouble which would be incurred by such substitution would seem to exceed the trouble of making the record and reputation checks. Moreover, if the use of consecutive short term leases were in fact a practical means of protection against loss of an auto because of the illegal actions of a lessee, the auto-rental firms could now protect themselves in gray areas by the consecutive short-term lease device. Rather, the danger from publicizing a clear dividing line between short and long term leases may lie in the fact that the knowledge of the distinction would encourage professional criminals to seek only those leases which fell in the defined short term category and which, accordingly, would not in the normal course be likely to subject them to checks upon their records and reputations. Here again, however, a criminal can now obtain an automobile from a rental agency without a record or reputation check upon him by applying only for a lease of a few days duration.

The internal standard under which records and reputations of the distant past are ignored is a type which will never cause the imposition of a sanction upon an innocent party. Here the public standard which applies to all records and reputations is always broader than the internal standard which ignores some records and reputations. A financial institution or auto-rental agency will always be protected if they refuse to do business with any one who has possessed a record or reputation, but they may be protected even when they do business with such a person as long as the record and reputation are sufficiently dated. Some room may exist for the internal standard to trap the unwary, however, if the financial institution or rental agency senses that an old record or reputation ought to be disregarded, but in which the institution makes a different judgment about the relevant time period than does the Narcotics and Dangerous Drug Section. The justification for keeping the Section's decisional standard here is not easily explained. The Deputy Chief of Section is now giving thought to the advisibility of making that standard public.

Bureau of Narcotics and Dangerous Drugs.—The former Bureau of Narcotics and the Bureau of Drug Abuse Control have been transferred from the Treasury Department to the Department of Justice where the functions of these two agencies have been combined in the Justice Department's Bureau of Narcotics and Dangerous Drugs. The Bureau is an enforcement agency which in the course of its work seizes vehicles used in narcotics violations. Vehicles having a worth of $2,500 or less seized by the Bureau are forfeited administratively by it (unless the owner of an interest in the vehicle files a claim and cost bond), and those vehicles having a worth in excess of $2,500 seized by it are required to be forfeited judicially in proceedings prosecuted by the Attorney General. Forfeiture remission and mitigation matters concerning vehicles subject to administrative forfeiture are handled by the Bureau, and those concerning vehicles subject to judicial forfeiture are handled by the Section of Narcotics and Dangerous Drugs of the Department's Criminal Division.

Mechanics incident to seizure.—When a vehicle is found to be operating in violation of the narcotics laws, it is seized. The driver is asked to turn the keys over to the Bureau agent seizing the vehicle, but if he refuses the agent will have the vehicle towed away. Not later than 10 days following the seizure, the District Supervisor is required to report to the Bureau the facts concerning the vehicle's use in violation of the law. Also within 10 days of the seizure letters are sent to the registered owner and to any lienholder giving notice of the seizure and of the contemplated forfeiture of the vehicle. The vehicle is appraised by the District office of the Bureau (using NADA and blue book values plus samplings of local dealer value estimates as standards), and if the vehicle is appraised at more than $2,500 notice of the seizure is also given to the local U.S. Attorney. Copies of the letters to the registered owner, lienholder and U.S. Attorney are required to be transmitted to Bureau headquarters. In the case of vehicles subject to administrative forfeiture, th District Supervisor is required to advertise the seizure and th intention to forfeit or otherwise dispose of the vehicle pursuan to 26 U.S.C § 7325(2). If no claim and cost bond is filed within the 20 day statutory period from the date at which the first advertisement appeared, the District Supervisor is required to prepare a Declaration of Forfeiture form which he sends to the Bureau for action. At the expiration of 60 days from the date on which the vehicle was seized, the Bureau will either place the vehicle in official use in the seizing district, contact other District officers of the Bureau to see whether the vehicle is desired for official use in any such district, authorize the seizing district to sell the vehicle (if the vehicle is older than six years or has more than 60,000 miles) or request the General Services Administration for authority to sell the vehicle (if it is less than six years old or has less than 60,000 miles).

Petitions for remission or mitigaton.—All persons inquiring about remission or mitigation are advised that petitions for vehicles subject to administrative forfeiture must be filed within 60 days from the date of the seizure. Petitions received by the District Supervisor after he has received notice from the Bureau that the vehicle has been assigned an identification number for official use are regarded as untimely. Petitions for restoration of the proceeds of sale are regarded as untimely if received after 90 days from the date of sale or from the District Supervisor's receipt of an identification number. Since the statute requires that a petitioner for restoration of the proceeds of sale was ignorant of the seizure, the letter sent within 10 days from the date of seizure to the registered owner and to any lienholder prevents many such petitions. Accordingly, the Bureau receives only one or two petitions for restoration of the proceeds of sale per year.

When a petition for remission or mitigation is filed, the District Supervisor is required to cause an investigation to be made by one of his agents. The agents operate under instructions contained in the agent's field manual as to the matters to be investigated. The investigation report—with a recommendation from the agent's supervisor—is required to be filed in Bureau headquarters within 21 days after the receipt of the petition for remission or mitigation. When a petition for remission or mitigation is filed with the District Supervisor concerning a vehicle subject to judicial forfeiture, the District Supervisor is required to forward the petition to the U.S. Attorney immediately and to transmit a copy of the petition to the Bureau. The investigation report which is transmitted to the U.S. Attorney (with a copy to Bureau headquarters) in such cases is required—

in addition to the other information which all investigation reports include—to contain a complete summary of the facts giving rise to the seizure, because the investigation report is the only information available to the attorneys in the Criminal Division's Section on Narcotics and Dangerous Drugs who act on remission and mitigation matters involving vehicles subject to judicial forfeiture.

All investigation reports are required to indicate the interest of the petitioner in the seized property. If a lienor is involved, the report should indicate the lienor's interest, the names of the person(s) to whom credit was extended, including the names of co-owners, mortgagers, co-signers indicated on the documents, the date credit was extended, the place credit was extended, the place of residence of all persons to whom credit was extended, and all places where credit inquiry was made. The report should indicate the record or reputation for commercial crime of the person to whom credit was extended or the use of the vehicle was entrusted. The report should indicate whether the information about an existing record or reputation would have been furnished if an appropriate inquiry had been made at the time credit was extended. The report also must indicate whether a lienor made an inquiry as to the record and reputation of the person or persons to whom credit was extended and whether a negative response in every city in which a credit investigation was made was received before credit was extended. The report should also indicate whether the petitioning registered owner had actual knowledge of the record or reputation of the person to whom the vehicle was entrusted. The report is required to inquire into circumstances surrounding a suspected straw purchaser, including the employment and earnings of the nominal purchaser, the belief of the vehicle salesman as to the existence of a straw purchaser. It is also required to indicate the amounts due the petitioning lending institution after eliminating certain specified financing charges which the Bureau does not recognize.

The investigation report which is transmitted to Bureau headquarters is referred to one Bureau attorney who spends at least one-third of his time reviewing all forfeiture remission and mitigation cases. (Previously, two Bureau attorneys performed this function.) The reviewing attorney may request elaboration or clarification of matters in the investigation report from the District Office. Requests by Bureau headquarters for more information occur in approximately one out of every eight cases. One area in which elaborations or clarifications are required with some frequency is in the area of "reputations". District offices often report the existence of a reputation on the generalized assertion of local law enforcement agencies; but the Bureau requires the basis in detail for such assertions. In one case in which I viewed correspondence between the Deputy Chief Counsel and a District office, a statement in an original investigation report affirming the existence of a reputation for commercial crime was, when the details were required by the Bureau, changed to a statement denying the existence of such a reputation. The reviewing attorney then prepares for the signature of the Chief Counsel an "action letter" which states the decision of the Bureau and sets forth the Bureau's reasons for its decision. Difficult questions or matters of which the reviewing attorney is unsure are either raised with the Deputy Chief Counsel before the attorney prepares the action letter and discussed at that time or flagged by him when he gives the draft action letter to the Deputy Chief Counsel. The "family"-type cases appear to be the most difficult ones to decide with assurance. Conferences between the reviewing attorney and the Deputy Chief Counsel on cases which the former is unable to decide usually last around one-half hour. Matters in which the Deputy Chief Counsel differs with the reviewing attorney are also usually discussed between them, and if the disagreement is not resolved they will discuss the matter with the Chief Counsel. If the disagreement turns on factual matters, they may call for further investigation. One in four cases will involve some discussion on review by the Deputy Chief Counsel or before.

The Deputy Chief Counsel reviews the staff attorney's work on the questions of the validity of the forfeiture and as to whether a proper investigation and recommendation have been made. Review by the staff attorney and the Deputy Chief Counsel is conducted pursuant to internal decisional norms promulgated by the Treasury in 1958, and in accordance with other norms contained in decisional memoranda, decisional criteria contained in agent's field manuals and instructions to Regional Directors, and unwritten criteria observed in Bureau headquarters. On some questions—such as the dividing line between long and short term auto rentals—the field manual instructs the investigating agent to seek instruction from the Bureau in making the initial analysis contained in his investigation report. That question is decided at Bureau headquarters, not pursuant to the internal rules, but on the basis of unwritten understandings or internal memoranda.

In the normal course, decisions are reviewed no further than the Chief Counsel. In one case, however, in which a U.S. Senator intervened on behalf of one of his constituents, the Bureau Director became involved because he handled the correspondence with the Senator. The Bureau Director's involvement—caused by the fortuitous circumstance of his handling the correspondence—brought the issues involved in the case to the Director's attention; and resulted in a change of the Bureau's internal rules on the point which was involved in that particular case.

Appeals.—It has been observed that rather extensive review procedures apply to the decision of forfeiture remission and mitigation cases. An agent's investigation report contains the recommendation of his superior; this is reviewed by a staff attorney at Bureau headquarters whose reommendations are, in turn, reviewed by the Deputy Chief Counsel. The final decision is made by the Chief Counsel. All of this occurs, however, without the participation of the claimant (except for his initial petition for remission or mitigation). If a case is decided adversely to a claimant, however, the claimant is notified by a so-called "action letter" which states the reasons for the decision against him. The action letter will specify the basis upon which, for example, the Bureau concluded that an objectionable record or reputation existed at the critical time and will state the claimant's omissions which were the basis for the Bureau's decision. If the claimant objects to any of these conclusions as inaccurate, he can request reconsideration and can supply information supporting his contention in his application.

The reconsideration procedure is not written anywhere. Moreover, the action letters do not inform the claimant to whom they are addressed of the possibility of seeking a reconsideration of his case. It is said that reconsiderations are such a rarity that the inclusion in an action letter of notice of the claimant's right to seek a reconsideration of his case would not be "worthwhile". Supporting letters from Congressmen generally accompany about one-third of the petitions for reconsideration, but normally these letters will not affect the decision on reconsideration because the Bureau's policies are so clear. (The ineffectiveness of these letters may also be partially due to the fact that few people in the Bureau lack job security.) In one case, however, Congressional intervention was successful for the indirect reason that correspondence from a U.S. Senator evoked return correspondence from the Bureau Director who became familiar with the case in that way. The result of the Bureau Director's familiarity with the case was a reversal of the prior Bureau remission decision and a change in the Bureau's internal rules consistent with the Director's decision in the remission case.

Under the prior practice prevailing when the Bureau was part of the Treasury Department, an adverse decision in a remission or mitigation case by the Bureau could be appealed to the Secretary of the Treasury. During the most recent six year period, however, the Treasury general counsel's office reversed the Bureau only once under this procedure. (The case was a "family" type.)

Decisional criteria.—The Bureau of Narcotics and Dangerous Drugs is operating largely on decisional criteria brought over with them from the Treasury. It will be recalled that 26 C.F.R. § 15.1 states publicly that the Treasury had adopted 18 U.S.C. § 3617(b) as a broad guideline for deciding remission and mitigation cases, except that in non-liquor cases the record and reputation reference in the statute will be read as referring to other appropriate types of crimes. In other regulations the Treasury has specified that "commercial crime" is the type of record and reputation which is relevant to remission and mitigation in non-liquor cases; and in the latter regulations it has also defined "commercial crime". The Bureau uses decisional criteria stated in its agents' field manual, memoranda to regional directors, 1958 Treasury internal rules, internal memoranda and unwritten understandings in deciding cases. I am told that the Bureau also uses court cases which deal with the validity of seizures on that issue; and they apparently also use court cases under the liquor laws to some extent in deciding remission and mitigation petitions relating to forfeitures under the non-liquor statutes. It is said that the Bureau basically runs on rules; it does not generally use precedent in deciding; and that the only cases which get into the difficult gray areas are the family cases involving, for example, issues as to what interest a father may have to show to establish that an automobile seized from his son is actually his. Here there are about ten factors which are relevant to decision; and the question usually is how many of the ten relevant factors are present in the case being decided. If half or less are present, the Bureau will return the car. If 6–10 are present, the Bureau will compromise the case by imposing a penalty. Each attorney keeps his own file of his prior decisions and occasionally in difficult "family" type cases he may look at a prior case which he recalls has involved some of the same factors. The practice is not systematized, however, and the cases are not normally decided by prior reference to past decisions.

The Alcohol and Tobacco Tax Legal Division.—The Alcohol and Tobacco Tax Legal Division is a component part of the Internal Revenue Service's office of Associate Chief Counsel (Litigation). That Division makes recommendations for decision on petitions for remission and mitigation of property seized for violations of the liquor laws in accordance with the provisions of 18 U.S.C. § 3617(b). It makes recommendations for decision on petitions for remission and mitigation of property seized for other internal revenue violations pursuant to 26 U.S.C. § 7327 which adopts by reference the remission and mitigation provisions of 19 U.S.C. §1618. Final action on petitions is taken by the Director of the Alcohol and Tobacco Tax Division. (The Alcohol and Tobacco Tax Division is a component part of the office of Assistant Commissioner (Compliance) and is organizationally separate from the Alcohol and Tobacco Tax Legal Division). All of the petitions for remission or mitigation passed on by the Alcohol and Tobacco Tax Legal Division concern property subject to administrative forfeiture. The majority of those petitions involve motor vehicles, but the Legal Division also passes upon remission and mitigation petitions involving firearms. In the past it has passed upon petitions concerning property seized under the anti-wagering laws, including money. Since two Supreme Court decisions[29] of last January, however, no gambling devices have been seized. The Division does not handle petitions involving property seized for narcotics violations.

When a petition for remission or mitigation is received, an agent referred to as an "investigator" is assigned to prepare an "investigation report". He is guided by instructions in a field manual which specify the matters which the report is expected to contain. Among other things, the report is expected to contain information about the claimant's interest in the seized property, the circumstances of seizure, whether a record and reputation check has been made in case the claimant is a commercial lienholder. I believe the same Treasury rules which in the past have governed the field investigations of Bureau of Narcotics agents govern the investigations of district "investigators" in the Internal Revenue Service. The investigator usually includes a comment upon the case assigned to him in his report, and his reviewer, a "group supervisor" makes a "recommendation" as to its disposition. The completed investigation report, together with the group supervisor's recommendation, is then transmitted to the Internal Revenue Service's Regional Office which includes the district in which the seizure was performed and in which the investigation report was prepared. In the Regional Office the investigation report and accompanying recommendation are reviewed by a working attorney and the Assistant Regional Counsel. The latter two prepare a "law and fact memorandum" which analyzes the "facts" contained in the investigation report for their significance in terms of the Internal Revenue Service's policy. The law and fact memorandum and an accompanying recommendation are then transmitted to the Alcohol and Tobacco Tax Legal Division in Washington.

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[29] Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).

Four or five attorneys in the Washington office perform as a part-time activity, the function of reviewing the recommendations which they have received from the Regions. They are located near each other, and are able to discuss difficult cases with each other. If the recommendation of the Regional Office is upheld, review in Washington is limited to a staff attorney and his reviewing officer. If the Regional Office recommendation is rejected, then the head of the Legal Division acts as a third level of headquarters review.

The staff attorney in the Division does not write a recommendation in situations in which the Regional Office's recommendation is approved. He merely approves the Region's recommendation. He does, however, prepare a draft letter to be sent by Administrative personnel to the field indicating the Service's final decision on the remission or mitigation petition. This letter directs action by the field officers only; the communication of the Service's decision to the petitioner is left to the field office. That communication, however, is supposed to state the reasons for the Service's decision at least in the case of denial; and the form of the communication is contained in field manual instructions.

Attorneys for petitioners sometimes do discuss matters with Legal Division Personnel. Telephone discussions are more frequent than personal interviews at the Legal Division office. While many of these telephone conversations involve inquiries as to the status of a petition, sometimes they involve discussions on the merits of a petition. Attorneys are more likely to become involved in conversations about cases with Service personnel at the Regional level. It is said that the Legal Division encourages attorneys who wish to discuss their cases to take them up at the Regional level, although I am not aware of how this practice is encouraged or of regulations which publicize it.

It is said that the Alcohol and Tobacco Tax Division has not encountered the difficulty reported by the Section of Narcotics and Dangerous Drugs and the Bureau of Narcotics and Dangerous Drugs of filed investigators accepting too readily police ascriptions of criminal "reputations" which were not well founded. The Division has not "very often" found a need to request clarifying information from the field; the experience of the Section and Bureau which have found that need in 8–10% of the cases has not been repeated in the Division.

In the past remission and mitigation petitions have run at the rate of about 500 per year. Last year they fell to around 300, and they are now running at the rate of around 20–30 per month.

Standards.—The public Treasury standards have been described in the discussion of the Bureau of Narcotics and Dangerous Drugs. Besides 18 U.S.C. § 3617(b), they consist of 31 C.F.R. § 15.1 and 26 C.F.R. §§ 172.9, and 172.38. The set of internal rules issued by the Treasury in 1958 referred to in the discussion of the Bureau of Narcotics and Dangerous Drugs would appear to govern the Alcohol and Tobacco Tax Legal Division's recommendations on remission and mitigation petitions. In addition, however, the Legal Division maintains letter files of prior cases to which back reference is made in deciding later cases which deal with points decided by earlier cases. The letter files are indexed and can be consulted by attorneys in the Division reviewing Region recommendations. Since the Division attorneys have experience in remission and mitigation matters, they do not routinely check the index and letter files; rather they consult them only in the difficult cases.

The letter files maintained by the Legal Division appear to contain memoranda written by the Legal Division in cases in which the Regional recommendations were rejected. They may also contain central policy statements prepared by the Legal Division. In any event, the Legal Division prepares such statements and uses them in the evaluation of Regional recommendations. Since Regional recommendations are not rewritten in cases in which they are approved, there appear to be no Legal Division memoranda prepared in the bulk of cases in which such approval is given. While copies of the Regional memoranda are undoubtedly filed at the Legal Division, I would guess that the index gears only into selected memoranda—and principally memoranda written at the Legal Division level.

It is said that probably more remission petitions are granted than denied, but I have no approximate figures. Banks probably are granted relief on most of their petitions despite their frequent omission to check records and reputations because in most of the relevant loan transactions the borrowers have no criminal record or reputation. It is said that more banks probably do not comply with the required record and reputation checks than do so comply. Mitigation is said to be a rare occurrence.

Appeals.—Appeals take the form of a request for reconsideration. Usually these are made in an informal manner through a letter. The Division is said to receive these requests only occasionally. Normally, petitioners are not informed of their right to seek reconsideration; it is said that most people are represented by attorneys who probably understand that reconsideration is available. Requests for reconsideration which do not contain new information, however, are quickly disposed of with a negative decision. No provision exists for appeal to the Secretary of the Treasury.

III. CHECKS AND CONTROLS IN DISCRETIONARY DECISION-MAKING

A. *Section on Narcotics and Dangerous Drugs*

1. Decisions which the Section makes concerning liquor-law matters are circumscribed by the fact that an unsatisfied claimant retains the option to seek remission or mitigation in court. The prospect of his success in court probably exercises a restraining influence upon the Section and one of the staff attorneys attests to the existence of this influence. Nothing much would be accomplished by administratively denying a remission which is subsequently granted in court. Accordingly the right to a de novo determination of the remission and mitigation question in court seems to operate to ensure that the internal standards employed by the Section are not more strict in their application than the public standards of 18 U.S.C § 3617(b) which are applied by the courts. While this potential judicial redetermination would operate as a check by which the *results* of the two determinations would tend to be brought into line, it would probably nonetheless influence both the content of the internal standards and the attitude with which they were employed and applied.

The effectiveness—or rather the lack of effectiveness—of this check is partially evidenced by those judicial awards of remission or mitigation to claimants who were turned down by the Narcotics and Dangerous Drugs Section. Each remission case which a claimant wins in court is a case in which the Section took a stricter view than did the deciding court. There is a temptation here to conclude (at least in retrospect) that since the statute makes the courts the ultimate interpreters of the relevant remission and mitigation standards in liquor cases, the Section erred in these cases by taking too strict an approach; and that the prospect of judicial redetermination was not a sufficient pressure to counter-balance the tendencies promoting an overly strict approach by the Section in these particular cases. Such a conclusion would not reflect an accurate measure of the judicial check, however, because many cases of judicial reversal may be merely redeterminations of close questions which could reasonably be decided either way.

The check posed by the prospect of judicial redeterminations is absent from the Section's remission and mitigation decisions arising under the narcotics, firearms and other forfeiture statutes pertaining to non-liquor matters. Nevertheless, to the extent that the judicial check influences the content of the Section's internal rules and the general approaches with which they are applied—and if the same rules are applied with the same general approaches towards the resolution of issues in the non-liquor cases—the factor of judicial redeterminations in the liquor cases may exert an indirect influence over the handling of the non-liquor cases. The Deputy Chief of Section states that the internal rules applied to non-liquor cases are identical to the internal rules applied to liquor cases.

2. The internal rules of the Section provide decisional criteria confining discretion within their bounds. The observance of these internal rules is promoted a) by the individual staff attorney's recognition of his obligation to apply them; b) by the check of Deputy Chief review of his work; and c) by the influences which conversations about his pending cases with the other staff attorney and with the Deputy Chief will have upon him in deciding. These conversations often should embody verbal exchanges in which the other party assumes or states the governing force of the Section's internal rules and which thereby creates some degree of external pressure on the deciding attorney to conform to his obligation to apply those rules.

3. The accumulated experience of the staff attorneys each of whom has performed remission work for years could constitute limitations upon the exercises of discretion. That experience could also constitute a referent to which decisions could be related or in the light of which decisions could be explained when the Sec-

tion's internal rules lack precise answers. The actual effectiveness of prior experience, however, is limited by the extent to which existing Section internal rules provide decisional criteria which the Section attorneys use. Their use of prior experience is also limited by the fact that the Deputy Chief of Section who lacks the staff attorney's prior remission experience reviews all of their decisions and almost always would prevail should a dispute arise with one of them as to how a particular case should be decided. Even so, the prior experience of the attorneys may influence the view taken by the Deputy Chief of Section; and opportunity for the attorney to communicate his prior experience to the Deputy Chief would always exist in those conversations with the Deputy Chief which would occur when the Deputy Chief disagreed with a staff attorney.

4. Discussions between the two staff attorneys on difficult cases which, I am told do in fact occur, would seem to promote the development of common approaches by the two men. When one of the attorneys orally expresses his views on a particular case and on the factors which he considers relevant to the other attorney, those views and factors are subjected to the other's critical evaluation. In the process of reacting to each other's views, each attorney will tend to clarify his own thinking, to perceive insights brought to his attention by the other attorney, and to verbalize orally in the presence of the other attorney his final resolution of the case with the reasons for arriving at that resolution. When, in the course of handling subsequent petitions, discussions again take place between the two attorneys, the second attorney is likely to question the first attorney on any radical departures which the latter makes from the general approach which he took and expressed orally to his colleague in connection with his resolution of the earlier petition.

This interchange of views and analyses between the two staff attorneys possesses a potency for clarifying and sharpening both individual analyses and generalized decisional norms. It also would seem to externalize each individual's developing decisional norms by encouraging their expression to his colleague. Once they are orally expressed, they have become external to himself in the sense that his colleague can challenge his departure from them in subsequent cases. Such a challenge would encourage an answer; and an answer made to a colleague is likely to be subjected to critical evaluation. The dialogue may work to pressure each attorney both to develop his decisional norms and to use them consistently, and to justify apparent departures from prior approaches.

5. Discussions between the two staff attorneys would also seem to carry the potential for encouraging common approaches to the resolution of petitions. One attorney may raise a point or a value which was not previously considered by the other; or he may raise a criticism of the use of such a point or value which the other had not previously considered. The raising of new points and insights does not compel the other attorney to adopt them; but if there is merit in the points raised which he appreciates he will be likely to adopt them or at least to justify to himself—and perhaps to the other attorney—why he is not incorporating these insights into his own approach. Discussions, in short, do not compel the development of common approaches to problems, but they encourage them.

6. To the extent that a staff attorney's passage from premises to conclusions is revealed in his written memoranda of recommendation, it is exposed to the scrutiny of the Deputy Chief of Section when the latter performs his reviewing function. The ability of a staff attorney to depart from the Section's internal decisional rules or guides or unwritten understandings is, accordingly, checked to the extent that such a departure would appear in his written recommendations. Since a staff attorney still could arrive at an incorrect result by applying correct decisional norms to erroneous factual conclusions, the extent to which the Deputy Chief review function encourages careful and accurate factual conclusions is also important. The extent to which factual conclusions are checked by the Deputy Chief's review depends not only on the extent to which the passage from evidence to conclusions is revealed in the attorney's memoranda of recommendation, but also on the extent to which the Deputy Chief probes orally into the bases upon which the attorney formed his conclusions. Here the point is not for the Deputy Chief to redo the work of the staff attorney, but rather in making inquiries, either systematically or at random, into the support for various factual conclusions to reenforce the staff attorney in his own determination to collect and to consider the relevant evidence and information and to form conclusions by proper methods of evaluation.

7. Oral discussions between the Deputy Chief of Section and a staff attorney would appear to have the potential for clarifying analyses and for subjecting them to critical scrutiny. They would have the potential for externalizing normative and analytical

approaches described in connection with discussions between the two staff attorneys. Here, however, the participation of the Deputy Chief means that his own normative approaches are forced to be verbalized in front of a subordinate. The verbalization of his normative approaches would tend to become a referent for future decisions by the staff attorneys. And the expectations of his subordinates would tend to exert some pressure on the Deputy Chief to adhere in future cases to the same approaches which he had earlier verbalized in their presence.

B. *The Bureau of Narcotics and Dangerous Drugs*

1. The Bureau does not handle liquor cases, which are the only ones for which de novo judicial determination of remission and mitigation is provided. It is said that the Bureau is guided by judicial decisions under U.S.C. § 3617(b), however, in its own decisions on remission and mitigation petitions. The court decisions do provide a referent for decision which is available to the Bureau; there is no complusion for the Bureau to use that referent, however.

2. The prior discussion about conversations in the Section of Narcotics and Dangerous Drugs between the two staff attorneys and between the staff attorneys and the Deputy Chief of Section is relevant to the Bureau of Narcotics and Dangerous Drugs with some exceptions: In the Bureau, only one staff attorney acts upon petitions. Accordingly, no opportunity exists for him to discuss cases with a colleague. He can, however, discuss cases with the Deputy Chief Counsel. Some cases have been decided directly by the Deputy Chief Counsel when the staff attorney has been absent. In these cases the opportunity for discussion is limited to that which the Deputy Chief Counsel might carry on with the Chief Counsel. In the latter situation, the confining and structuring aspect of discussion appears to be largely absent.

3. The Bureau of Narcotics and Dangerous Drugs operates under internal rules issued by the Treasury in 1958. These rules confine discretion and form referents to which reasoned elaborations can be attached for the decision of cases to which the rules provide no answer. The Deputy Chief Counsel of the Bureau believes the Bureau operation differs from that of the Narcotics and Dangerous Drugs Section in that the latter, he thinks, operates with unwritten rules.

4. The Bureau appears to operate under written memoranda and unwritten understandings which govern decisions of certain

issues. The Bureau handling of so-called "family" cases appears to provide an example of decisions which are based on criteria embodied in internal memoranda.

5. The interest of the Deputy Chief Counsel in ensuring that field investigation reports obtain supporting details on asserted criminal "reputations" seems likely to influence the attitude of the staff attorney subordinate to him in his own review of investigation reports. It may also affect the attitude of the regional offices.

C. *The Alcohol and Tobacco Tax Legal Division*

1. The review of investigation reports in the Division is, at least on paper, more extensive than in the Section and Bureau. Four attorneys review each investigation report (two in the Regional Office and two in Washington) and in case the Regional Office's recommendation is rejected, five attorneys review the case. Such extensive review appears to promote consistent disposition of cases.

2. The Treasury rules governing the decision of remission and mitigation cases also operate to confine discretion.

3. The precedent system complete with indexing system is a discretion confining system present in the Division which is apparently not used in the Section and in the Bureau. The precedent system assures consistency.

4. Opportunity for the staff attorneys to discuss difficult cases with each other and with their superiors is a potential discretion confining device and a device for developing standards. Because of the systematized precedent system, however, that discussion may be of some less importance in confining discretion here than in the Section and Bureau.

5. Opportunity for petitioners' attorneys to discuss the merits of cases at the Regional level provides a non-official input of information to the drafters of the memoranda of law and fact which forms the basis for most decisions. The success of this mechanism in affecting official decision-making depends upon the extent to which concerned attorneys are aware of this opportunity for discussion and the extent to which the officials engaging in those discussions actually participate in drafting the law and fact memoranda and recommendation or at least communicate to those who do participate relevant information presented by the private attorneys. Additional information stemming from

those discussions provides a new referent which a conscientious decision-maker would consider in making his factual finding.

D. *The Investigation Report*

An important place in which "discretionary" decisions are made which affect the outcome of a remission or mitigation petition is in the making of factual findings by the seizing agency in the process of its preparation of its investigation report. The leeway for casual or sloppy decision-making allowed at this level is, accordingly, important. Controls by the seizing agency designed to ensure that conclusions are properly made consist in directives and supervision. See the discussion of the Bureau of Narcotics and Dangerous Drugs infra p. 737. Controls and checks are also exerted by the Narcotics and Dangerous Drugs Section to the extent that it is able to spot fact finding deficiencies and to insist that they be corrected.

A crucial place in which seizing agencies appear to make factual findings frequently without due care is in the area of "reputation" of a borrower for crime. Both at the Bureau of Narcotics and Dangerous Drugs and at the Section of Narcotics and Dangerous Drugs, the careless manner in which findings of the existence of such reputations are often make in investigation reports were mentioned. It seems that the agents preparing investigation reports often take police affirmations about the existence of criminal reputations without questioning the bases for these supposed reputations. Yet the agent preparing the report is (at least in the Bureau of Narcotics and Dangerous Drugs) supervised and the U.S. Attorney is supposed to review the report before it is passed on to the Section of Narcotics and Dangerous Drugs. The supervisor and the U.S. Attorney, therefore, seem to be checks which are not entirely successful. The burden of insisting that conclusions about the existence of a criminal "reputation" be adequately supported, accordingly, falls on the attorneys passing on remission and mitigation in the Section of Narcotics and Dangerous Drugs and in the headquarters offices of the seizing agencies. The latter appear more directly capable of engendering patterns of careful and thorough investigation since the agents operate under the authority of their own headquarters offices. Habitual under-investigation by particular agents or offices can more easily be discovered and corrected. The Section attorneys can request additional information in specific cases, but they may not be able to locate particular investigators who habitually misperform nor may they be capable of taking remedial action if they do. The Section might be able indirectly to insist on improved performance by insisting that the local U.S. Attorneys require adequately supported factual conclusions, especially conclusions about reputation in investigation reports from seizing agencies. This more discriminating attitude on the part of the U.S. Attorneys towards investigation reports may be hard to instill by the Section, however, because of the small number of cases likely to be channelled through any one U.S. Attorney each year.

IV. EVALUATION OF THE SUBSTANTIVE STANDARDS

The Underlying Policy.—The remission standards are based on a policy of encouraging record and reputation checks by financial institutions and auto-rental agencies. Apparently the thought of the enforcement agencies is that if the checks are in fact generally made criminals will be cut off from these two sources of automobiles. They will obviously not be prevented, however, from using automobiles. Moreover, even if all of the enforcement agencies' standards were observed, a person intending to transport a quantity of narcotics in an automobile would be able to rent a relatively new automobile for the time required for that transportation, because under the prevailing standards no record or reputation check by the auto rental firms is required on a short term lessee. While no one probably thinks it likely that law violations would be prevented if the financial and auto-rental institutions observed the enforcement agencies' standards, the enforcement agencies may feel that the observance of their standards would force criminals to purchase outright the automobiles which they use in illegal liquor, narcotics, etc. traffic and thereby risk a larger investment to possible forfeiture. An approach which would thus attempt to increase the financial risks upon law violators would be superficially most consonant with the concern of the Senate committee to strike at the pocketbooks of criminals through vehicle forfeitures.

Lack of Legal Obligation to Conform to the Policy.—It should be observed that no lending institution or auto rental agency is under any legal obligation to check on the record or reputation of its clients, except in those cases in which unusual circumstances indicated that one of them is so likely to violate the law that the omission to check on the client's propensity for crime would commonly be assessed as negligent. No statute or rule creates any legal obligation to make record and reputation checks. 18 U.S.C. § 3617(b) states in effect that such a check by a lending institution is a prerequisite to judicial remission of a security interest held by it in an auto or aircraft seized for violation of the liquor laws; it does not impose a legal obligation to make such a check. It cannot be fined nor can its license be jeopardized for failing to make such checks. 26 C.F.R. § 15.1 merely states Treasury adoption of the 18 U.S.C. § 3617(b) standards for the decision of remission and mitigation cases. It also does not impose a legal obligation to make record and reputation checks. Since banks and auto rental agencies have no legal obligation to make record and reputation checks in routine cases, their only motivation for making such checks is the purely economic one engendered by the Justice and Treasury Department's threat to confiscate their security interests in the event that such a check has been omitted in connection with a loan granted on an automobile later seized for law violation. Such a naked threat—carrying no legal obligation—is likely to be evaluated by those to whom it is addressed in purely economic terms: Does it cost more to make the checks which the Justice and Treasury Departments seek than is represented by the discounted harm represented by the threat? or vice versa?

Substantial Noncompliance with the Policy.—Since the Narcotics and Dangerous Drugs Section grants only about two-fifths of the remission and mitigation petitions coming before it and the Bureau of Narcotics and Dangerous Drugs grants about 50% of its remission and mitigation petitions, it is clear that a substantial portion of those petitions are denied by both agencies. Moreover, many banks and other lending institutions may not petition when it is clear that their petitions would be denied for failure to comply with the record and reputation check requirement. The record and reputation check requirement is probably not made a routine part of the lending practices of at least the large volume lending institutions. Small volume lending institutions may fail to comply with those requirements out of ignorance. I understand that the Bureau of Narcotics and Dangerous Drugs allocates the equivalent of one-half day of a girl's time per week to answering record and reputation inquiries. The equivalent of eight days per week is a substantial amount of time in some absolute sense, but it is not clear what relation eight days bears to the total time required to answer inquiries on all credit-purchasers of new cars. Some more accurate index of the inquiries handled by the Bureau of Narcotics and Dangerous Drugs could be obtained from the logs of inquiries which each of its offices maintains. In some places local law enforcement agencies will not respond to such inquiries. The more difficult it is to obtain an unambiguous response, the greater is the burden of routinizing record and reputation checks in granting loans, especially on a volume basis. I understand that credit investigation agencies routinely maintain a newspaper file on credit applicants, but they do not routinely make record and reputation checks with law enforcement agencies. Accordingly, the information furnished to lending institutions by the credit investigation agencies will carry information about criminal records or reputations which can be gleened from newspaper reports; it will not carry information which could be had by checking with federal or local law enforcement agencies. The credit agencies will probably make such checks if specifically requested to do so, but they will charge for it. And in many cases the lending institutions will not consider the charge worth the benefit of the protection from a chance of confiscation.

The result is that the Justice and Treasury Departments are busily concerned with applying penalties to lending institutions for violating standards embodying record and reputation check requirements in a context in which many lending institutions generally disregard those standards. The deterrent function of the standards then becomes largely inoperative; and to that extent the Government's confiscation of security interests loses its underlying rationale.

Should the Substantive Standards Be Modified?—Would the Justice and Treasury Departments' policies make more sense if they were limited to denying remission in those circumstances in which lending or auto rental institutions had some reason for believing that a client would use the automobile furnished to him to violate the laws? Under such a policy the disparity between what was asked of banks and auto rental agencies and what they actually might do would be substantially reduced. At the present time many banks may check into a loan applicant's record or reputation only if circumstances suggested that he may be involved in narcotics or other activities which would subject his automobile to forfeiture. If the Justice and Treasury Department's policies were changed to conform to this practice, they might lose the routine record and reputation checks which they may now obtain from some low volume lending institutions. Perhaps a better alternative would be to adopt requirements which varied with the circumstances of the lender. The Deputy Chief of the Narcotics and Dangerous Drugs Section expressed the fear with respect to another suggestion that small town banks might be held responsible for the records and reputations of their clients while the large urban banks would not be so held. If the small town banks, however, can assume that responsibility at little or no cost to them, but the urban banks cannot, then the two classes of banks operate in significantly different circumstances and it would be appropriate for their responsibilities to differ. Perhaps the responsibilities of classes of banks should vary depending upon the actual costs to them of fulfilling their respective responsibilities. Prima facie, no bank should be held to a standard to which is economically infeasible for it to conform.

There remains an argument for the present strict liability standards, however, if under it banks will uncover significantly more objectionable records and reputations than they otherwise would. If the existence of a single absolute standard encourages many banks—not to make record and reputation checks routinely —but to be more sensitive than they otherwise would be to those unusual circumstances which would suggest inquiry be undertaken into the records and reputations of clients, then a reasonable basis for preserving the absolute standard may exist. A utilitarian approach would make the preservation of the present standard or its abolition depend upon the degree to which the level of bank performance is improved by the present stricter standard. At some point a notion of justice ought to enter, and limit the confiscation of security interests in cases in which the holders of those interests were not at fault. I leave the determination of the proper ethical balance to others.

Power to Modify the Standards.—Apart from liquor-law forfeitures, the statutes granting power to remit and to mitigate forfeitures do not provide very precise standards for exercising that power. 19 U.S.C. § 1618, which is part of the customs laws, for example, provides that remission or mitigation can be granted if the forfeiture was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law" or if there exist "such mitigating circumstances as to justify the remission or mitigation." Nothing in that or other remission and mitigation statutes other than 18 U.S.C. § 3617(b) says the slightest thing about the need of a lending institution to make record and reputation checks on a borrower in order to safeguard its security interest against confiscation. The adoption of a form of the 18 U.S.C. § 3617(b) liquor-law provisions as standards governing remission and mitigation under different statutes concerned with different types of crimes was and is a free choice of the Secretary of the Treasury and the Attorney General.

Possible Illegality of the Present Standards.—The argument could be made that the adoption of the 18 U.S.C. § 3617(b) standard to govern exercises of discretion under 19 U.S.C. § 1618 is not consistent with the latter statute's standards. The consistency of the § 3617(b) standards with 19 U.S.C. § 1618 depends upon whether the absence of a record or reputation check by a lending institution or an auto rental agency is "willful negligence" or demonstrates "an intention . . . to defraud the revenue or to violate the law." To my mind, it does not. The omission to make a record or reputation check could constitute willful negligence only (i) in those cases where something unusual indicated that a particular loan or auto lease applicant was prone to violate the narcotics, etc. laws; or (ii) if lending institutions and auto rental agencies had a legal obligation to make record or reputation checks. No statute or administrative rule creates such an obligation.

The Historical Derivation of the Present Standards Evaluated.—The content of the liquor-law remission and mitigation standards are explainable, in large part at least, by their history. It is a matter of common knowledge that the Prohibition Act was widely violated. Since the Prohibition Act provided for the seizure and forfeiture of automobiles used to transport alcohol and alcoholic beverages, a lender faced a risk that some automobiles on which he held a security interest would be seized for violation of the Prohibition Act and forfeited. Whether that risk was substantial or not is open to question. Even in fiscal 1930–31, the Prohibition authorities are reported to have seized only 8,261 automobiles. The risk of loss from seizure, however, was greater than risk of loss from the insolvency of debtors, since lenders could reclaim his security interest from insolvent debtors. It was in this context that the Secretary of the Treasury adopted the principle that he would refuse remission of automobiles to lending institutions in cases in which they had not taken precautions against what he termed the "bootleg risk" by checking the records and reputations of borrowers for liquor law violations before extending them credit. He thus imposed a "bootleg risk" on the lending institutions and in doing so took advantage of the risk magnification effect of total seizure, viz. autos likely to be seized times total loss of security; he thereby attempted to enlist lending institutions to deny funds to likely liquor law violators for automobile purchases. When the prohi bition Act was repealed in 1935, the Congress took note of the Secretary's policy in administering his discretionary power to grant remissions, and enacted it into law as the standard to be applied by the courts in granting remissions and mitigations on vehicles seized for liquor law violations. The Congress thought that it was following the same course which the Secretary had previously laid out: it was "merely" requiring "that in the making of . . . [a credit] inquiry, the 'bootleg hazard' also be examined as one aspect of the credit risk." The Secretary's policy seems to have assumed that by denying remission or mitigation to lending institutions who did not check out a bootleg risk, he would make the bootleg hazard a perceptible part of the total credit risk. Whether or not that assumption was correct in the prohibition era, the bootleg hazard is not a perceptible part of the total credit risk in 1968.

In 1968 violations of the liquor laws are not common. Despite newspaper stories to the contrary, violations of the narcotics laws are not common. Nor are violations of the laws against counterfeiting. Violations of none of these laws occur on a scale resembling the violations of the Prohibition Act. Accordingly, the prospect of the loss of a security interest in an automobile is often not a realistic part of the credit risk perceived by a lending institution when it loans money for an automobile purchase. Moreover, the volume lenders often do not in fact make the inquiries necessary to protect their security interests against confiscation; they do not make those inquiries because the cost of making them outweighs the financial risk of confiscation.

In some societies—such as small town or rural societies today—a lender may know borrowers personally. Or borrowers may have lived in the same location for all of their lives or for long periods. In those cases that provision of 18 U.S.C. § 3617(b) which requires—in addition to a local record and reputation check—a record and reputation check in every location in which a credit check is made is generally inoperative. It applies in only a few cases. In today's urban and highly mobile society, that provision of 18 U.S.C. § 3617(b) probably is much more generally operative. What was a requirement for the unusual case in 1935 may now be a requirement applying to routine cases. A minor burden may have been transformed into more of a major one.

Other conditions in 1968 differ from those of the prohibition era. The threat of confiscation may induce a lending institution to make record and reputation checks when it is relatively costless to do so. Perhaps volume lending in the prohibition era neither existed on today's scale nor was it as systematized as today. Accordingly, in that time period, the additional checks required by the Secretary of the Treasury may only have required an additional telephone call by a clerk who would not otherwise have performed any significantly productive action during the time consumed in making the telephone call. Low volume lending institutions may today find it costless to make the requisite record and reputation checks. High volume lending institutions may find that routinely making the requisite checks adds significantly to the cost of making loans; and when it adds an amount which exceeds the discounted confiscation risk they will be unlikely to make those checks.

Today's society is also probably much more mobile than the society of the 1920's and early 1930's. The remission and mitigation policy of the Secretary of the Treasury during that period seems premised on the view that automobiles are relatively unusual things; and that the lending of money to purchase an automobile is almost participation in the activities for which the borrower uses the automobile. The remission policy is based on a "but for" causality connection between the granting of the loan and the fact that the automobile purchases with the borrowed money was used in a law violation. Today automobiles are everywhere and owned by everyone. The denial of a loan to purchase an automobile probably will mean that the loan applicant will purchase an older automobile outright rather than a new automobile on credit. He will in any event possess an automobile; the "but for" causality link between the lender and the law violation probably does not frequently exist. The result is that the provisions of 18 U.S.C. § 3617(b) are largely anachronistic in the present day and should be repealed. As long as 18 U.S.C. § 3617(b) remains on the statute books, however, the Justice and Treasury Departments have little choice but to enforce it in the cases of motor vehicles seized for liquor law violations. They should not, however, incorporate an anachronistic statute as a model for exercising discretion under other and different laws where there is no compulsion to do so.

The "Commercial Crime" Aspect of the Standard Used in Non-Liquor Cases.—For application in non-liquor cases, the Justice and Treasury Departments have adopted a modification of the 18 U.S.C. § 3617(b) standard which in effect requires lending institutions and long term bailors to check records and reputations of their clients for "commercial crime". Commercial crime has a very definite meaning which is specified in 26 C.F.R. § 172.9:

> "Commercial crimes" shall be deemed to mean any of the following types of crimes (Federal or State): Offenses against the revenue laws; burglary; counterfeiting; forgery; kidnapping; larceny; robbery; illegal sale or possession of deadly weapons; prostitution (including soliciting, procuring, pandering, white slaving, keeping house of ill fame, and like offenses); extortion; swindling and confidence games; offenses involving gambling or wagering; and attempting to commit, conspiring to commit compounding or aiding, abetting, counseling, commanding, inducing or procuring the commission of any of the foregoing crimes. Addiction to narcotic drugs and use of marihuana will be treated as if such were commercial crime.

It has already been observed that the Justice Department does not have any regulations at all on the subject of remission and mitigation; a fortiori it does not spell out the commercial crime referent or its meaning in any published regulation. The Treasury, in its basic regulation stating its decisional criteria in remission and mitigation cases, 31 C.F.R. § 15.1, states that it is guided by the 18 U.S.C. § 3617(b) provisions but that:

> In considering a person's record or reputation for crime, the Treasury Department does not, however, limit itself to crimes involving the liquor laws. It also considers other crimes, a record or reputation for which might reasonably lead to the belief that a person with such a record or reputation would be more prone than the normal to be involved in a violation leading to an automobile forfeiture.

Why does the Treasury not refer to the commercial crime definition of 26 C.F.R. § 172.9 in its statement about decisional criteria contained in 31 C.F.R. § 15.1? A reading of 31 C.F.R. § 15.1 as presently written would not provide the reader with the information which a reference to 26 C.F.R. § 172.9 would provide. The lack of such reference in 31 C.F.R. § 15.1 tends to obscure the important question as to whether the quoted statement from 31 C.F.R. § 15.1 is consistent with the "commercial crime" definition in 26 C.F.R. § 172.9. And the answer to that question would have an important bearing on the validity—or at least the propriety—of the "commercial crime" aspect of the decisional standard employed in remission and mitigation cases. Insofar as the imposition of a record and reputation check requirement is considered to perform a useful purpose in making it more difficult for likely violators of the liquor, narcotics, counterfeiting, etc. laws to obtain access to automobiles, then the Treasury seems to have correctly stated that the relevant records and reputations would be those which would indicate that a person "would be more prone than the normal to be involved in a violation leading to an automobile forfeiture." Consider, however, as an example, the "larceny" aspect of "commercial crime". Especially in the poor or ghetto neighborhoods, it may not be uncommon for a person to have been convicted of a minor theft. Suppose a person is convicted for stealing a tire. It is not apparent to me that he is any more likely to subject his automobile to forfeiture in a narcotics or counterfeiting situation than any other person. "Illegal . . . possession of deadly weapons" is another example. A war veteran who retains possession of a captured automatic weapon as a souvenir runs the risk of conviction. But a conviction in that circumstance would probably not indicate a potentiality for later offenses giving rise to forfeiture. Moreover, even if a conviction of a veteran for illegal possession of a deadly weapon were shown statistically to evidence a greater than normal propensity for a second illegal possession offense—it would not indicate at all a propensity to commit a narcotics violation. Accordingly, why should a record for illegal possession of a deadly weapon (i) make it difficult for a person to obtain an automobile loan? and (ii) why should such a conviction bar a bank from remission in the event such a person's auto is used in a narcotics violation? The Deputy Chief Counsel of the Bureau of Narcotics and Dangerous Drugs feels that the "commercial crime" standard should be changed. The relevant record and reputation, he states, should concern the type of crime for which the vehicle is seized; and he feels that under such a standard the "loss" to the Government would not be substantial. Whatever the "loss" or profit to the Government on automobile seizures under such a rationalized standard, the loss does not seem the most appropriat criterion with which to evaluate the advisability of modifyin the decisional standard to bring it more into line with the purposes of seizure and remission. It must be observed, however that modifying the decisional standard to confine the relevan record and reputation to the type of crime for which a vehicle i seized would lessen the number of vehicles in which uncooperating banks' security interests would be confiscated. If that numbe were significantly lessened, the incentive to banks and other a fected institutions to make any checks on records and reputa tions would be reduced. The present situation under which man institutions omit such checks might then be aggravated. Th might then call for a reappraisal of the policy under which suc checks are expected from lending and auto rental institution It is interesting that a modification of the decisional standa concerning record and reputation checks which would tie that standard more closely to the purposes of the seizure and remission statute could make the resulting more rational record and reputation check requirement less likely to be observed.

V. SOME FINAL COMMENTS ABOUT THE EXERCISE OF ADMINISTRATIVE DISCRETION IN REMISSION AND MITIGATION

Remission and mitigation, as practiced in the Section of Narcotics and Dangerous Drugs, in the Bureau of Narcotics and Dangerous Drugs and in the Alcohol and Tobacco Tax Legal Division can be criticized as an area in which insufficient discretion is practiced. That the rules are quite rigidified is illustrated by the Section's response as to how a hypothetical case of mine would be decided:

> Case: A university professor, in taking a year's leave of absence, rents his house and automobile to a second professor from another university who plans to visit at the first professor's university during the year in which the first professor is away. The first professor does not check on the record and reputation of the second professor. The second professor in fact has a record or reputation for narcotics laws violations, and he is later arrested for a narcotics violation while driving the rented automobile of the first professor.
>
> Decision: The case falls clearly under the rules applicable to a commercial bailor. Remission of the automobile would be denied to the petitioning first university professor. This result obtains despite the fact that the first professor is completely ignorant of the rules governing commercial bailors (and despite the fact that the Section has not published those rules).

Indeed, the Deputy Chief Counsel of the Bureau of Narcotics and Dangerous Drugs suggested that a common attitude of Government employees administering rules such as those involving remission and mitigation would be to apply them strictly on the theory that otherwise they would be derilict in their duty to preserve for the Government all of the property which belongs to it.

More striking to me than the rigid application of rules, is the fact that remission and mitigation seems to be an area in which administrators seem largely to have cut themselves off from the world with which they are dealing. However sensible the record and reputation check requirement was in the 1935 Act repealing the Prohibition Law, propriety of the record and reputation check requirement now seems open to question. Why was that standard incorporated into the administration of remission and mitigation of property seized under other laws? How much investigation and study preceded the adoption of that standard? Why was the record and reputation check requirement broadened to refer to all "commercial crime"? Some feedback from the industries involved on the operation of the administrative policies and some competent evaluation of the effectiveness of the record and reputation check standard in controlling crime would be desirable tools for reevaluating that standard. These agencies, in all but liquor law enforcement, have a broad discretionary power to formulate remission and mitigation standards. But they have not made effective use of that power. They have indeed controlled discretion but they have done so by adopting a set of rules ultimately derived from the experience of the prohibition era without, it seems to me, adequately considering the relevance of those rules for their tasks of deciding remission and mitigation petitions under narcotics, firearms, and other non-liquor laws. In my view they should have controlled discretion by examining the problems connected with the enforcement of the narcotics, firearms, etc. laws, by listening to suggestions and objections from the banking and auto-rental industries and to the reasoned analyses of competent law enforcement authorities. The latter approach would open remission and mitigation administration into a productive dialogue with the world with which it is dealing and would furnish continuing feedback on the operations of whatever standards it was administering and how they could be improved. The past administration of remission and mitigation appears to be focused inward upon itself to an objectionable degree. An original liquor standard was adapted for use in other areas without adequate evaluation of its usefulness or workability, but perhaps largely because it was familiar. The extension of the limited record or reputation check referent of the liquor law to refer to the broader referent of commercial crime has too much of the extension by analogy in it to be completely satisfactory.

VI. THE QUESTION OF JUDICIAL REVIEW

The courts have taken the view that administratively made remission and mitigation decisions are not judicially reviewable—even for abuses of discretion. They have sidestepped claims by innocent property owners to judicially guaranteed fair treatment by accepting the premise that the property in question is properly forfeited to the Government because of the object's culpability for participation in the crime giving rise to the seizure.[30] Under such an approach the owner's loss is treated as an unfortunate consequence of the liability incurred by his property; remission of the property to him, therefore, is giving him something to which he is not entitled. It is an "act of grace" or of "mercy" by the Government.[31] He is said, therefore, to have no claim to fair procedures. Once the absurdity of attributing culpability to inanimate objects is admitted—and such an admission ought to be relatively easy to make in 1968—then the claims of property owners for fair treatment have to be answered.

An interconnection between history and ease of administration may account for the application of forfeiture laws to whole units of property which were in fact used in violation of law. It may be that Congress thought that by acting against property brought into the country in violation of the customs laws, persons with an interest in imported property were placed in the position of affirmatively seeing to it that the requisite duties were paid. Thus, the stimulation of owners of property to greater care in its use is one rational basis on which Blackstone placed the English law of forfeiture. Moreover, acting against property had an ancient tradition in the laws. But once the Congress designed its statutes to authorize proceedings against "things", it created the appearance of having impliedly accepted the historical tradition which attributed a fictional culpable or noxious quality to the things proceeded against. Congress recognized the moral claims of innocent property owners and provided them with administrative remedies of remission and mitigation. But, consistently with the fictional property culpability theory impliedly adopted by Congress, they were not given a court-enforceable right to remission or mitigation and the satisfaction of their claims appeared to constitute acts of "grace" or of "mercy" by the Government.

Whether from these reasons or not, early Congresses placed remission and mitigation power in the hands of the Secretary of the Treasury. This was done in the earliest statutes by authorizing the Secretary of the Treasury to grant remission or mitigation "if in his opinion the . . . [forfeiture] was incurred without willful negligence or any intention of fraud. . . ."[32] An early case interpreting such a statute denied review of a remission decision on the ground that the Court would be incapable of determining what "opinion" the Secretary might have.[33] Later decisions focused on the historical legal tradition seemingly embodied in the forfeiture approach and denied judicial protection to the owners of seized property on the ground that the owners were incidentally harmed by the forfeiture which was incurred by the culpable act of the property.[34] Judicial review prior to the mid-twentieth century seems to have been denied largely on the ground that the property owners of seized property had lost their "rights" in it due to the fictionally culpable act of the property itself; that remission was, accordingly, an act of grace or mercy; and perhaps because the decisional power was vested in a cabinet officer whose decisions the courts may have wished to avoid challenging when possible. More recently, when the courts have been asked to review remission decisions under the Administrative Procedure Act, they have found that because the older cases denied review—often on the animistic property culpability theory—remission decisions had historically been entrusted to "agency discretion" [35] in the terms of the Administrative Procedure Act.[36] Accordingly, they have found that those decisions fall within the Act's exception to judicial review which applies to action committed to agency discretion. To the extent that the recent cases find the Administrative Procedure Act exception applicable in reliance on earlier cases which have denied judicial review to administratively made remission decisions on an "act of grace" approach which in turn is founded on the fiction of the culpability of inanimate objects, the law pertaining to judicial review of administratively made remission and mitigation decisions is wrong. Other reasons may support an approach which would deny judicial review to administratively made remission and mitigation decisions; but they apparently do not often find expression in the reported case law.

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[30] Goldsmith-Grant Company v. United States, 254 U.S. 505, 510–513 (1921).

[31] Dorsheimer v. United States, 74 U.S. 166, 174–175 (1868).

[32] E.g., 2 Stat. 122, 123 (1790).

[33] United States v. Morris, 23 U.S. (10 Wheat.) 246, 283 (1825).

If administratively made remission decisions were made judicially reviewable, the number of cases which would actually reach the courts would probably be few in number, because the small values of seized automobiles would not warrant it. All vehicles administratively forfeited must be of an appraised value of $2,500 or less. The Section of Narcotics and Dangerous Drug which deals with judicially forfeitable vehicles would seem primarily affected by a provision for judicial review, and eve there it would seem that only the more valuable of the auto mobiles denied remission would warrant recourse to the court of appeals.

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[34] Goldsmith-Grant Company v. United States, supra; Dobbin's Distillery v. United State 96 U.S. 395, 401 (1877). See also Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

[35] E.g., United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964).

[36] 5 U.S.C. § 701(a)(2).

Note, however, if judicial review were in fact provided, the decisions of the several agencies making remission and mitigation decisions would be exposed to outside and disinterested evaluation and criticism. Their standards would probably come to light as a result of that review. Judicial review might force the agencies to make their decisional standards public in accordance with Section 3 of the Administrative Procedure Act. It might force the Section of Narcotics and Dangerous Drugs to state its reasons for decision in the form of public "opinions" rather than in the form of secret "recommendations." Judicial review might expose to public criticism and evaluation the policies presently pursued by the agencies. It might subject to challenge the practice of incorporating the 18 U.S.C. § 3617(b) standard into the discretionary remission and mitigation power of 19 U.S.C. § 1618. It might also challenge the policy of the Departments of Justice and Treasury largely to read the mitigation provisions out of the statutes which they are administering. I do not mean to suggest that the courts would decide all—or even any—of these issues against the agencies presently exercising remission and mitigation power; but I do mean to suggest that judicial review would permit these issues to be raised openly and to be decided by outside and disinterested persons.

VIII. RECOMMENDATIONS

1. Assuming the validity of the distinction between (a) standards which govern administrative decision-making and (b) standards to which the public is required to conform, it nevertheless appears that:

   (i) The Justice Department should, at the very least, publish the standards to which the public is required by it to conform.

   (ii) The three agencies discussed in this report should publish in a more articulate fashion than the Treasury now publishes them, the standards to which the public is expected to conform. This means that if "commercial crime" is a decision-making referent, it should be explicity referred to in the regulation enunciating its policies. It also means that the separate categorization of auto and truck leasing firms should be stated.

2. The Section of Narcotics and Dangerous Drugs should transmit a written opinion to each petitioner for remission or miti-

gation; and that opinion should be open to public inspection. The present practice of embodying the reasons for decisions in a recommendation which is transmitted only to the U.S. Attorney should be discontinued.

3. The Justice and Treasury Departments should clearly articulate their mitigation policies and practices in regulations published in the Federal Register and in the Code of Federal Regulations. To the extent that the practice of granting of mitigation has been abandoned, the Congress and the public have a right to be informed of that practice.

4. Consideration should be given by the Bureau of Narcotics and Dangerous Drugs to maintaining a file of their action letters which is open to public inspection. At the present time action letters are nominally open to public inspection, but a file of all action letters is not. A person may inspect one or more action letters only by identifying the cases to which they pertain.

5. The Justice and Treasury Departments should reevaluate the relevance of records and reputations for "commercial crime" in connection with the decision of remission and mitigation petitions.

6. The Justice and Treasury Departments should reevaluate the "reputations" as distinguished from "records" in connection with the decision of remission and mitigation petitions.

7. The Justice and Treasury Departments should reevaluate the philosophy which requires lending institutions and auto-rental agencies to check records and reputations of their clients before contracting with them. They should reevaluate whether such checks are indeed part of the general credit risk as they were described thirty some years ago. They should reevaluate the "but for" causation theory which implicates lenders and auto-rental agencies in the crimes of their clients. They should consider the impact of their present policy on the poor and on released convicts attempting to reform their lives.

8. In making the reevaluations suggested in recommendations 5, 6, and 7, it would be highly desirable for the Justice and Treasury Departments to solicit the views of the several classes of banks, auto-rental agencies and other interested persons. It would also be highly desirable for the Justice and Treasury Departments to state reasoned bases for the conclusions which they make on reevaluation.

9. Administrative decisions on petitions for remission or mitigation of forfeitures should be made subject to judicial review on a substantial-evidence basis.

10. The Congress should reevaluate the standards for remission and mitigation of forfeitures which presently are embodied in 18 U.S.C. § 3617(b). It should consider whether the "bootleg hazard" which was deemed a part of the regular credit risk in 1935 can still accurately be so described. It should consider whether the premises which underlay 18 U.S.C. § 3617(b) remain valid in 1968. No great expense would seem to be encountered in maintaining a file of prior action letters. However, the likelihood that such a file would be extensively used is probably small. (The Bureau reports no requests have been received to date to examine numbers of unidentified prior action letters).

APPENDIX A

ACTION LETTERS OF BUREAU OF NARCOTICS AND DANGEROUS DRUGS

Fla 321-M

October 28, 1968.

Mr. L. Dorsett
General Motors Acceptance Corporation
5016 South Dixie Highway
West Palm Beach, Florida 33405

Re: 1966 Chevrolet—Serial No. 113116W158910

DEAR MR. DORSETT: The petition for remission or mitigation of forfeiture of the above-described automobile submitted by you on behalf of General Motors Acceptance Corporation, is hereby denied. The petition is denied since Romeo Rivard, the person to whom credit was extended, had a record and reputation for commercial crime at the time credit was extended to him. Had the petitioner made appropriate inquiry of the Palm Beach County Sheriff's office, it would have informed that Romeo Rivard was arrested on May 5, 1962, in Lewiston, Maine, for breaking and entering and subsequently convicted.

The policy of the Department of Justice does not contemplate that a lienor must investigate every possible source of information to determine whether or not a prospective debtor has a record or reputation for commercial crime. However, it does require that at least one such source be checked. Inquiry could have been made of any Federal, State, or local law enforcement agency.

The petitioner, by extending credit to Romeo Rivard, without making an appropriate inquiry of a law enforcement agency and receiving a negative reply, is not entitled to administrative relief under the applicable policy. The Department of Justice policy is similar to that established by the Congress in 18 U.S.C. § 3617(b) regarding vehicles used in violation of the liquor laws. However, in the case of forfeitures involving narcotic drugs or marihuana, the Department does not limit itself to liquor violations, but also considers other crimes which have any commercial aspect.

On April 8, 1968, Reorganization Plan No. 1 transferred the Bureau of Narcotics and the Bureau of Drug Abuse Control to the Department of Justice and created the Bureau of Narcotics and Dangerous Drugs. This decision is issued under the authority of the Attorney General.

Sincerely yours,
DONALD E. MILLER,
Chief Counsel.

2cc–Region #5
DC/LFBussler/lbh/184–3773

October 29, 1968.

CHARLES W. SANDELL
Attorney At Law
2008 Westlake Avenue
Seattle, Washington 98121

Re: 1965 Chevrolet Impala Serial No. 164395L115598

DEAR MR. SANDELL: This refers to your recent letter requesting we review our decision denying the petition of Mrs. Onis G. Goodin for remission or mitigation of forfeiture of the above-described vehicle.

A careful examination of our letter denying the petition will reveal that we did not state Paul Alan Goodin was a convicted offender prior to the time he was arrested for the violation leading to the seizure of this vehicle. We did state, however, that Mrs. Goodin knew her son had been involved in a marihuana violation prior to the time she permitted him to use her vehicle.

Paul Alan Goodin was arrested in San Ysidro, California, on June 30, 1968, for smuggling marihuana, Mrs. Goodin was well aware he had been arrested for this offense and that he was receiving psychiatric treatment for drug use at the time she permitted him to use the automobile.

The rules regarding remission or mitigations of forfeiture of vehicles seized for use in violation of the Federal narcotic and marihuana laws provide that if a vehicle is seized and forfeited for a violation perpetrated by a person to whom its owner permitted its possession or use, relief will be denied to the owner if he knew or was chargeable with knowledge that the person to whom possession or use was permitted had a record *or reputation* for narcotic or marihuana violations. While it is true that Paul Alan Goodin has not been tried for smuggling marihuana, the rules contemplate that a petition be denied if the owner permitted his vehicle to be used by a person having a reputation for narcotic or marihuana violations. The fact that Mr. Goodin had previously been arrested for this violation and is currently undergoing psychiatric treatment for drug use is ample evidence establishing a reputation sufficient to deny the owner's petition under the applicable rules.

Since it appears that the denial of the petition was in strict accord with the policy of the Department of Justice in this type case, I find there is no basis for reversal or modification of the previous decision.

Sincerely yours,
DONALD E. MILLER,
Chief Counsel.

2 cc: Regional Director, No. 13
Seattle, Washington
DC/LFBussler/wsp/184–3773

APPENDIX B

RECOMMENDATIONS BY SECTION OF NARCOTICS AND DANGEROUS DRUGS

Narcotic and Dangerous Drug

19 U.S.C. 1618 as made applicable by 49 U.S.C. 784 to forfeitures under the narcotics laws
FMV:WFO:B:pib
Central California
Re: One 1968 Cadillac Eldorado,

MEMORANDUM TO THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

October 15, 1968.

Recommending that the petition be denied

Petitioner:

Forfeiture: Subject automobile appraised at $5,400.00 on July 17, 1968, the date of seizure: Forfeiture complaint has not been filed.

Petitioner's interest: Claims an interest of $6,599.29 in the automobile as legal owner thereof under a conditional sales contract, dated March 15, 1968 executed by ________ both of Los Angeles, California, which contract was assigned to the petitioner by the latter firm on March 18, 1968. The car is registered to ________.

Facts: On June 20, 1968, one ________ and a companion used the subject car to transport a shoe box containing 49.960 grams of heroin and 5.040 grams of cocaine to the ________. Thereafter ________ was arrested on July 17, 1968, as she entered the subject vehicle at a repair lot a short distance from her home.

Petitioner's allegations: Petitioner, among other things, alleges that ________, the conditional vendee, executed a credit application on March 15, 1968, on the basis of which a favorable credit investigation was made and the contract was purchased; that there has been a default under the terms of the agreement in that ________ agreed not to misuse the car or to permit it to be misused or in connection with a violation of law; and by reason of the seizure, the petitioner has declared the amount due under the contract payable and is entitled to possession of the car. Petitioner asserts that the contract was acquired in good faith without any knowledge or reason to believe that the car was being or would be used in violation of the law.

Report of investigator: According to the investigative report ________ was the owner of the car and the financing of the car began on March 18, 1968, but credit was extended to the registered owners ________ on March 15, 1968. The salesman stated ________ picked out the car and made the down payment of $450.00 on it. Her name as well as the ________ names are on the purchase order. ________ after the car was seized, verified that ________, his step daughter, was the owner of the car. ________ name appears on the credit application as the principal driver. ________ had no record or reputation for commercial crimes at the time of financing. The report shows, however, that ________, "co-signer on the Sales Contract", had a prior record dating from 1948, including arrests and sentencing on charges of petty theft and in 1961, burglary. The report also shows that ________, the true owner of the car, had a prior record of arrests and sentencing from 1961 on charges of petty theft and prostitution. No inquiry was made as to the moral hazard respecting any of these persons.

Recommendation of field officers: The United States Attorney concurs in the recommendation of the District Supervisor, BN&DD, that the instant petition be denied.

Discussion: We are in accord with the recommendation of the above officials. If this was not a straw purchase transaction, there might be some question whether denial of the petition would be appropriate since ________ was not a party to the contract as such under which the claimant acquired its interest in the car, although she signed the credit application. However, it is unnecessary to consider this aspect of the case as a basis for denial as the petition is subject to denial because the true purchaser, ________ had a prior record for commercial crimes and no inquiry was made as to her. The facts show that ________ were straw purchasers for ________ and that the salesman knew of the nature of the transaction. Thus, the ________ as assignee of the dealer, is chargeable with the latter's knowledge of the true purchaser's identity. As ________ had a prior record for commercial crimes and no inquiry and negative reply was made and received by the ________ as to the moral hazard involved respecting ________ the ________ has not established its compliance with the administrative requirements for eligibility for relief from the forfeiture of the subject automobile.

Apart from the above reasons for denial of the petition, it is noted that ________ name appears on the purchase order along with the names of ________ and ________ as purchasers. The ________ therefore was on notice that regardless of whose name was on the contract ________ was at least to be one of the purchasers or owners of the car. The same conclusion applies to ________ and she too had a prior record. On the basis of this knowledge, the ________ should have made an inquiry as to all three of the parties involved in the transaction. Denial of the petition under such circumstances also would be warranted.

Recommendation: I join with the United States Attorney and the District Supervisor, BN&DD, in recommending that the instant petition be denied.

Approved:
Fred M. Vinson, Jr.
Assistant Attorney General

By: ________________________________
Chief, Narcotic and Dangerous Drug Section
Date: ________________________________

Narcotic and Dangerous Drug

19 U.S.C. 1618 as made applicable by 49 U.S.C. 784 to forfeitures under the narcotics laws

FMV:WFO:B:pib

Southern Ohio
Re: One 1966 Cadillac

November 5, 1968.

MEMORANDUM TO THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Recommending that the petition of ______ be denied
and
Recommending that the Petition ______________________
Petitioners: 1 ______________________
2 ______________________

Forfeiture: Subject 1966 Cadillac Fleetwood Sedan, appraised at $4,695.00, April 26, 1968, three days after seizure.

Petitioners' interest: 1. ______ claims ownership of the car. 2. ______ claims an interest of $5,496.39 in the car under a chattel mortgage executed on November 22, 1967, by ______ both of Dayton, Ohio, and assigned to the petitioner by the latter firm. Its recognized equity is stated as $4,007.53.

Facts: The subject automobile was seized on April 23, 1968, because of its use on April 22, 1968, by ______ in the deposit and concealment of a quantity of heroin and because of its use to facilitate the sale and delivery of the heroin to an informant who was under constant observation by Dayton, Ohio police and Bureau of Narcotic and Dangerous Drugs agents.

Petitioners' allegations: 1) ______ asserts, *inter alia*, that ______ was using the car to move some personal effects from one address to her home; that the car was not used for any illegal purpose; that she never permitted the car to be used for an illegal purpose; and that to her knowledge it was not being used for any illegal purpose, presumably that she had no knowledge or reason to believe that in letting ______ use the car, the car had been or would be used for such purpose.

2) ______ among other things asserts that in accepting the contract from ______ it had no knowledge that the car was being or would be used to assist in engaging in any illegal acts, and that no adverse information concerning Lovell was reported as a result of a credit investigation it had obtained as to her.

Report of investigator: 1) The investigator reports that ______ advised that she bought the car for her own use; that her son, ______ chauffered her; that she permitted him to use the car. The initials ______ were on both front doors of the car and ______ refused to explain this. According to a ______ detective, ______ had been advised by him of ______ activities as a "procurer of women"; that she knew her son held no active employment; and that she assisted him financially. According to information received from several sources, ______ was paying for the car. He had been convicted in 1962 on a charge of carrying a concealed weapon, was fined $200.00 and put on probation. He also was listed in the ______ as a "procurer of woman".

The report states that the car was purchased by ______ but the agent believes she was a straw purchaser for her son. The car is registered to the petitioner.

2) No question is raised as to the validity of the ______ interest in the car. The report shows that this petitioner made a credit check on ______ in August 1967, in connection with her purchase of a 1964 Cadillac, traded in when the subject car was purchased, at which time she was approved as a credit risk with the notation "O.K. but Watch". No law enforcement check was made. However, "no information could have been obtained from the police files relative to ______ name was not referred to in ______ account with ______ according to its representatives. The report discloses that information in the files of the ______ reflect six incidents of bad credit practices on ______ part, including three vehicle repossessions and one loan rejection on another. This information was in the possession of ______. The files reflect that ______ was divorced from ______ in 1949 and the Police files reflect that he had a long record including several arrests and convictions on narcotics charges. The salesman recalled that ______ was accompanied by a boyfriend when she bought the subject car but he could not recall his physical description. (Report on ______)

Recommendation of field officers: According to the United States Attorney's letter of September 24, 1968, the Bureau of Narcotics and Dangerous Drugs recommends that the petition of ______ be granted. The Acting Regional Director, BN&DD, recommends that ______ petition be denied.

Discussion: 1) ______ petition. The investigation discloses the possibility that this petitioner may have been a straw purchaser for her son. However, I find that such a conclusion could not be sustained merely on the fact that her son's initials were on the doors of the Cadillac and information received by the agent that ______ was making the payments on the car without more. However, I find from the record before us that ______ as known to the ______ as a "procurer of women" and that this petitioner actually had been advised of this activity by a member of the ______. Procuring is a crime of a commercial nature. Although no reference is made thereto, this petitioner must have known of her son's conviction on the "concealed weapons" charge. I conclude therefore that in permitting ______ to have the free use of her automobile under the circumstances, this petitioner undertook the risk that it might be used in violation of the law and that therefore she is not entitled to the relief she seeks here.

2) ______ I find that ______ acquired a valid interest in the automobile from ______, that at the time such interest was acquired ______ had no record or reputation for commercial crimes; and was the true buyer of the car; that even if she were not, this fact would not have been known to the dealer or to the petitioner. Where a person has no criminal record or reputation, a finance company need not establish that it made an inquiry as to such person and received a negative reply from a law enforcement agency in order to be entitled to relief from a forfeiture. I conclude therefore that the petitioner has met the minimum requirements to entitle it to have its petition accorded favorable consideration. The fact that ______ poor credit record was known to the petitioner does not constitute a basis for denial of a petition under the Department's policy.

Recommendation: I join with the Bureau of Narcotics and Dangerous Drugs in recommending that the petition of ———— be granted subject, however, to the terms and conditions set forth in the accompanying letter to the United States Attorney. I also join in that Bureau's recommendation that ———— petition be denied.

Approved:
FRED M. VINSON, JR.
Assistant Attorney General
By: ____________________
Chief, Narcotic and Dangerous Drug Section
Date: ____________________

APPENDIX C

STATUTES

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

§ 3617. Remission or mitigation of forfeitures under liquor laws; possession pending trial.

(a) Jurisdiction of court.

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation.

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, on the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

(c) Claimants first entitled to delivery.

Upon the request of any claimant whose claim for remission or mitigation is allowed and whose interest is first in the order of priority among such claims allowed in such proceeding and is of an amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to him; and, upon the joint request of any two or more claimants whose claims are allowed and whose interests are not subject to any prior or intervening interests claimed and allowed in such proceedings, and are of a total amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to such of the joint requesting claimants as it designated in such request. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the United States. In all other cases the court shall order disposition of such vehicle or aircraft as provided in sections 304f–304m of Title 40, and if such disposition be by public sale, payment from the proceeds thereof, after satisfaction of all such expenses, of any such claim in its order of priority among the claims allowed in such proceedings.

(d) Delivery on bond pending trial.

In any proceeding in court for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall order delivery thereof to any claimant who shall establish his right to the immediate possession thereof, and shall execute, with one or more sureties approved by the court, and deliver to the court, a bond to the United States for the payment of a sum equal to the appraised value of such vehicle or aircraft. Such bond shall be conditioned to return such vehicle or aircraft at the time of the trial and to pay the difference between the appraised value of such vehicle or aircraft as of the time it shall have been so released on bond and the appraised value thereof as of the time of trial; and conditioned further that, if the vehicle or aircraft be not returned at the time of trial, the bond shall stand in lieu of, and be forfeited in the same manner as, such vehicle or aircraft. Notwithstanding this subsection or any other provisions of law relating to the delivery of possession on bond of vehicles or aircraft sought to be forfeited under the internal-revenue laws, the court may, in its discretion and upon good cause shown by the United States, refuse to order such delivery of possession. (June 25, 1948, ch. 645, 62 Stat. 840.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 18, U.S.C., 1940 ed., § 646 (Aug. 27, 1935, ch. 740 § 204, 49 Stat. 878).

A minor change was made in phraseology.

CROSS REFERENCES

Remission of vehicles forfeited under customs or navigation laws, see section 1613 of Title 19, Customs Duties.

Remission of mitigation forfeiture—

Distilled spirits, wines, or malt beverages, see section 5688 of Title 26, Internal Revenue Code.

Under internal revenue laws generally, see section 7327 of Title 26, Internal Revenue Code.

§ 3618. Conveyances carrying liquor.

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture. (June 25, 1948, ch. 645, 62 Stat. 840.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on section 247 of title 25, U.S.C., 1940 ed., Indians (Mar. 2, 1917, ch. 146, § 1, 39 Stat. 970).

TITLE 19.—CUSTOMS DUTIES

§ 1618. Remission or mitigation of penalties.

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs agent, collector, judge of the United States Customs Court, or United States commissioner, to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition. (June 17, 1930, ch. 497, title IV, § 618, 46 Stat. 757; 1946 Reorg. Plan No. 3, eff. July 16, 1946, §§ 101–104, 11 F.R. 7875, 60 Stat. 1097.)

TITLE 26.—INTERNAL REVENUE CODE

§ 5855. Unlawful transportation in interstate commerce.

It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-fixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce. (Added Pub. L. 85–859, title II, § 203(i)(1), Sept. 2, 1958, 72 Stat. 1428).

§ 5861. Penalties.

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 729.)

§ 5862. Forfeitures.

(a) Laws applicable.

Any firearm involved in any violation of the provisions of this chapter or any regulation promulgated thereunder shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles are extended to and made to apply to the articles taxed under this chapter, and the persons to whom this chapter applies.

(b) Disposal.

In the case of the forfeiture of any firearm by reason of a violation of this chapter: No notice of public sale shall be required; no such firearm shall be sold at public sale; if such firearm is forfeited for a violation of this chapter and there is no remission or mitigation of forfeiture thereof, it shall be delivered by the Secretary or his delegate to the Administrator of General Services, General Services Administration, who may order such firearm destroyed or may sell it to any State, Territory, or possession, or political subdivision thereof, or the District of Columbia, or at the request of the Secretary or his delegate may authorize its retention for official use of the Treasury Department, or may transfer it without charge to any executive department or independent establishment of the Government for use by it. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 729.)

TITLE 26.—INTERNAL REVENUE CODE

PART II.—PROVISIONS COMMON TO FORFEITURES

Sec.

7321. Authority to seize property subject to forfeiture.
7322. Delivery of seized personal property to United States marshal.
7323. Judicial artion to enforce forfeiture.
7324. Special disposition or perishable goods.
7325. Personal property valued at $2,500 or less.
7326. Disposal of forfeited or abandoned property in special cases.
7327. Customs laws applicable.
7328. Confiscation of matches exported.
7329. Cross references.

AMENDMENTS

1968—Analysis of sections amended by Pub. L. 85–859, title II. § 204 (11), Sept. 2, 1958, 72 Stat. 1429, which substituted "$2,500" for "$1,000" in item 7325.

§ 7321. Authority to seize property subject to forfeiture.

Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate. (Aug. 16, 1954, 9:45 a.m. E. D. T., ch. 736, 68A Stat. 869.)

§ 7322. Delivery of seized personal property to United States marshal.

Any forfeitable property which may be seized under the provisions of this title may, at the option of the Secretary or his delegate, be delivered to the United States marshal of the district, and remain in the care and custody and under the control of such marshal, pending disposal thereof as provided by law. (Aug. 16, 1954, 9:45 a.m., E.D.T. ch. 736, 68A Stat. 869).

§ 7323. Judicial action to enforce forfeiture.

(a) Nature and venue.

The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

(b) Service of process when property has been returned under bond.

In case bond as provided in section 7324(3) shall have been executed and the property returned before seizure thereof by virtue of process in the proceedings in rem authorized in subsection (a) of this section, the marshal shall give notice of pendency of proceedings in court to the parties executing said bond, by personal service or publication, and in such manner and form as the court may direct, and the court shall thereupon have jurisdiction of said matter and parties in the same manner as if such property had been seized by virtue of the process aforesaid.

(c) Cost of seizure taxable.

The cost of seizure made before process issues shall be taxable by the court. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 869.)

CROSS REFERENCES

Authorization for action to recover forfeiture, see section 7401 of this title.

Jurisdiction of district court of the United States of proceeding for recovery of forfeiture, see section 1355 of Title 28, Judicial Procedure.

§ 7324. Special disposition of perishable goods.

When any property which is seized under the provisions of section 7301 or section 7302 is liable to perish or become greatly reduced in price or value by keeping, or when it cannot be kept without great expense—

(1) Application for examination.

The owner thereof, or the United States marshal of the district, may apply to the Secretary or his delegate to examine it; and

(2) Appraisal.

If, in the opinion of the Secretary or his delegate, it shall be necessary that such property should be sold to prevent such waste or expense, the Secretary or his delegate shall appraise the same; and thereupon

(3) Return to owner under bond.

The owner shall have such property returned to him upon giving bond in an amount equal to such appraised value to abide the final order, decree, or judgment of the court having cognizance of the case, and to pay the amount of said appraised value to the Secretary, or otherwise, as may be ordered and directed by the court, which bond shall be filed by the Secretary or his delegate with the United States attorney for the district in which the proceedings in rem authorized in section 7323 shall be commenced.

(4) Sale in absence of bond.

(A) Order to sell.

If such owner shall neglect or refuse to give such bond, the Secretary or his delegate shall issue to any Treasury officer or employee or to the United States marshal an order to sell the same.

(B) Manner of sale.

Such Treasury officer or employee or the marshall shall as soon as practicable make public sale of such property in accordance with such regulations as may be prescribed by the Secretary or his delegate.

(C) Disposition of proceeds.

The proceeds of the sale, after deducting the reasonable costs of the seizure and sale, shall be paid to the court to abide its final order, decree, or judgment.

(5) Form of bond and sureties.

For provisions relating to form and sureties on bonds, see section 7101.

(Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 870; Sept. 2, 1958, Pub. L. 85–859, title II, § 204(9), 72 Stat. 1429; Sept. 2, 1958, Pub. L. 85–866, title I, § 78, 72 Stat. 1662.)

AMENDMENTS

1958—Pub. L. 85–868 amended par. (3), by eliminating "district" preceding "attorney".

Pub. L. 85–859 amended section to include property seized under section 7302 of this title.

EFFECTIVE DATE OF 1958 AMENDMENTS

Amendment of par. (3) of this section by Pub. L. 85–866 as effective Aug. 17, 1954, see section 1(c) of Pub. L. 85–866, set out as a note under section 165 of this title.

Amendment of section by Pub. L. 85–859 as effective on Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as a note under section 5001 of this title.

Cross References

Disposition of proceeds of forfeited property in customs cases, see section 1613 of Title 19, Customs Duties.

§7325. Personal property valued at $2,500 or less.

In all cases of seizure of any goods, wares, or merchandise as being subject to forfeiture under any provision of this title which, in the opinion of the Secretary or his delegate, are of the appraised value of $2,500 or less, the Secretary or his delegate shall, except in cases otherwise provided, proceed as follows:

(1) List and appraisement.

The Secretary or his delegate shall cause a list containing a particular description of the goods, wares, or merchandise seized to be prepared in duplicate, and an appraisement thereof to be made by three sworn appraisers, to be selected by the Secretary or his delegate who shall be respectable and disinterested citizens of the United States residing within the internal revenue district wherein the seizure was made. Such list and appraisement shall be properly attested by the Secretary or his delegate and such appraisers. Each appraiser shall be allowed for his services such compensation as the Secretary or his delegate shall by regulations prescribe to be paid in the manner similar to that provided for other necessary charges incurred in collecting internal revenue.

(2) Notice of seizure.

If such goods are found by such appraisers to be of the value of $2,500 or less, the Secretary or his delegate shall publish a notice for 3 weeks, in some newspaper of the district where the seizure was made, describing the articles and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within 30 days from the date of the first publication of such notice.

(3) Execution of bond by claimant.

Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the Secretary or his delegate a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $250, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bond to the Secretary or his delegate, he shall transmit the same, with the duplicate list or description of the goods seized to the United States attorney for the district, and such attorney shall proceed thereon in the ordinary manner prescribed by law.

(4) Sale in absence of bond.

If no claim is interposed and no bond is given within the time above specified, the Secretary or his delegate shall give reasonable notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall, unless otherwise provided by law, sell the articles so seized at public auction, or upon competitive bids, in accordance with such regulations as may be prescribed by the Secretary or his delegate.

(Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 870; Sept. 2, 1958, Pub. L. 85-859, title II, §204 (10), (12), 72 Stat. 1429; Sept. 2, 1958, Pub. L. 85-866, title I, § 78, 72 Stat. 1662.)

Amendments

1958—Pub. L. 85-866 amended cl. (3) by eliminating "district" preceding "attorney".

Pub. L. 85–859 amended catchline opening provisions, and cl. (2), by substituting "$2,500" for "$1,000", and cl. (4) by inserting", unless otherwise provided by law", preceding "sell the articles".

EFFECTIVE DATE OF 1958 AMENDMENTS

Amendments of par. (3) of this section by Pub. L. 85–866 as effective Aug. 17, 1954, see section 1(c) of Pub. L. 85–866, set out as a note under section 165 of this title.

Amendment of section by Pub. L. 85–859 as effective on Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as a note under section 5001 of this title.

CROSS REFERENCES

Sale of seized articles or merchandise of value of $1,000 or less, see section 1607 of Title 19, Customs Duties.

§ 7326. Disposal of forfeited or abandoned property in special cases.

(a) Coin-operated gaming devices.

Any coin-operated gaming device as defined in section 4462(a)(2) upon which a tax is imposed by section 4461 and which has been forfeited under any provision of this title shall be destroyed, or otherwise disposed of, in such manner as may be prescribed by the Secretary or his delegate.

(b) Narcotic drugs.

For provisions relating to disposal of forfeited narcotic drugs, see sections 4714, 4733, and 4745 (d).

(c) Firearms.

For provisions relating to disposal of forfeited firearms, see section 5862(b).

(Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 871; Sept. 2, 1958, Pub. L. 85–859, title II, §204 (13), 72 Stat. 1429.)

AMENDMENTS

1958—Subsec. (a) added by Pub. L. 85–859.

Subsecs. (b) and (c), formerly pars. (1) and (2), so redesignated by Pub. L. 85–859.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment of section by Pub. L. 85–859 as effective on Sept. 3, 1958, see section 210(a)(1) of Pub. L. 85–859, set out as a note under section 5001 of this title.

§ 7327. Customs laws applicable.

The provisions of law applicable to the remission or mitigation by the Secretary or his delegate of forfeitures under the customs laws shall apply to forfeitures incurred or alleged to have been incurred under the internal revenue laws. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 871.)

Chaper 11.—Seizure and Forfeiture of Carriers Transporting, etc., Contraband Articles.

Sec.
781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined.
782. Seizure and forfeiture.
783. Designation of officers by Secretary of Treasury: duties of officers.
784. Application of related laws.
785. Availability of appropriations.
786. Construction with other laws.
787. Definitions.
788. Rules and regulations.
789. Guam; enforcement and administration of chapter.

§ 781. Unlawful use of vessels, vehicles, and aircrafts; contraband articles defined.

(a) It shall be unlawful (1) to transport, carry or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

(Aug. 9, 1939, ch. 618, § 1, 53 Stat. 1291; Aug. 9, 1950, ch. 655, 64 Stat. 427.)

References in Text

The National Firearms Act, referred to in subsec. (b)(2), was repealed by act Feb. 10, 1939, ch. 2, § 4, 53, Stat. 1. Similar provisions were incorporated in chapter 25 of Title 26, Internal Revenue Code, 1939, and are incorporated in chapter 53 and sections 4181, 4182, 4216, 4224, 4225 6001, 6011(a), 6065(a), 6071, 6081(a), 6091(a), (b)(1)(2), 6151(a), 6302 (b), 6416 (c), (f), 6601(a), (f)(1), 6671, 6672, 7201–7203, 7343 and 7701(a)(1) of Title 26, Internal Revenue Code 1954.

Amendments

1950—Subsec. (b)(1) amended by act Aug. 9, 1950, to expand the definition of "Contraband article" as that definition relates to narcotic drugs thus increasing the situations in which vessels, vehicles, and aircraft used in illegal traffic of narcotic drugs may be seized and forfeited.

§ 782 Seizure and forfeiture.

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. (Aug. 9, 1939, ch. 618, § 2, 53 Stat. 1291.)

CROSS REFERENCES

Narcotic drugs—

False shipping manifest or lack of manifest, penalties, see section 1584 of Title 19, Customs Duties.

Seizure and forfeiture in connection with violation of revenue laws, see sections 4706, 4714, 4733, 4745 and 7301(a) of Title 26, Internal Revenue Code.

Seizure and forfeiture where found on vessel and not shown on manifest or landed from vessel without permit; other penalties, see section 184 of Title 21, Food and Drugs.

§ 783. Designation of officers by Secretary of Treasury; duties of officers.

The Secretary of the Treasury is empowered to authorize, or designate, officers, agents, or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder. (Aug. 9, 1939, ch. 618, § 3, 63 Stat. 1292.)

§784. Application of related laws.

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided*. That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels and vehicles under the customs laws shall be performed with respect to seizures and forfeitures of vessels, vehicles, and aircraft under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of the Treasury. (Aug. 2, 1939, ch. 618, § 4, 53, Stat. 1292.)

APPENDIX D

REGULATIONS

CODE OF FEDERAL REGULATIONS

TITLE 31—SUBTITLE A

PART 15—POLICY WITH RESPECT TO THE REMISSION AND MITIGATION OF FORFEITURE INCURRED BY VEHICLES UNDER VARIOUS STATUTES RELATING TO INTERNAL REVENUE CUSTOMS, NARCOTICS, AND THE SECRET SERVICE

§ 15.1 Remission and mitigation of forfeitures incurred by vehicles.

From time to time inquiries are received by the Treasury Department regarding the policy which it pursues in connection with mitigation and remission decisions with respect to automobile forfeitures incurred under various statutes administered by the Treasury Department through the Internal Revenue Service, the Bureaus of Customs, Narcotics and the Secret Service. Among such statutes are 19 U.S.C. 1594 (Customs), 49 U.S.C. 782 (Internal Revenue, Narcotics and Secret Service) and 26 U.S.C. 7301 and 7302 (Internal Revenue).

The Secretary of the Treasury by statute (19 U.S.C. 1618, 26 U.S.C. 7327 and 49 U.S.C. 784), and certain other Treasury officers by delegation from the Secretary, have discretionary authority to mitigate or remit forfeitures of this type. Relief is granted, from time to time, in favor of persons who have interests in the vehicles if the persons were not in any way involved in the violations. However, relief is not granted to one who made the vehicle available to the person involved in the violation with any knowledge, or the ability to know, that such person had a criminal record or reputation.

The Treasury Department desires to point out that in its exercise of its discretion it is guided by a standard similar to that which the Congress has established in 18 U.S.C. 3617(b) with respect to the mitigation and remission by courts of forfeitures in connection with violations of the liquor laws. In relevant part that section provides that remission or mitigation shall not be allowed on behalf of any claimant "if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, [unless it appears] that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation."

In considering a person's record or reputation for crime, the Treasury Department does not, however, limit itself to crimes involving the liquor laws. It also considers other crimes, a record or reputation for which might reasonably lead to the belief that a person with such a record or reputation would be more prone than the normal to be involved in a violation leading to an automobile forfeiture.

[26 F.R. 4742, May 30, 1961]

TITLE 26—CHAPTER 1

§ 172.9 Commercial crimes.

"Commercial crimes" shall be deemed to mean any of the following types of crimes (Federal or State): Offenses against the revenue laws; burglary; counterfeiting; forgery; kidnapping; larceny; robbery; illegal sale or possession of deadly weapons; prostitution (including soliciting, procuring, pandering, white slaving, keeping house of ill fame, and like offenses; extortion; swindling and confidence games; offenses involving gambling or wagering; and attempting to commit, conspiring to commit, compounding or aiding, abetting, counseling, commanding, inducing or procuring the commission of any of the foregoing crimes. Addiction to narcotic drugs and use of marihuana will be treated as if such were commercial crime.

§ 172.37 Form of the petition.

There is no set or standardized form provided or required by the Department for use in filing a petition for remission or mitigation of forfeiture. However, it is preferable that the petition be typewritten on legal size paper; and it is necessary that the petition be executed under oath, prepared in triplicate and addressed to the Director, Alcohol and Tobacco Tax Division, and that all copies of original documents submitted as exhibits in support of allegations of the petition be certified as true and accurate copies of originals. Each copy of the petition must contain a complete set of exhibits.

§ 172.38 Contents of the petition.

(a) *Description of the property.* The petition should contain such a description of the property or carrier and such facts of the seizure as will enable the officers of the Internal Revenue Service concerned to identify the property or carrier.

(b) *Statement regarding knowledge of seizure.* In the event the petition is filed for the restoration of the proceeds derived from sale of the property or carrier pursuant to summary forfeiture, it should also contain, or be supported by, satisfactory proof that the petitioner did not know of the seizure prior to the declaration or condemnation of forfeiture, and that he was in such circumstances as prevented him from knowing of the same.

(c) *Interest of petitioner.* The petitioner should state in clear and concise terms the nature and amount of the present interest of the petitioner in the property or carrier, and the facts relied upon to show that the forfeiture was incurred without willful negligence or without any intention upon the part of the petitioner to defraud the revenue or to violate the law, or such other mitigation circumstances as, in the opinion of the petitioner, would justify the remission or mitigation of the forfeiture.

(d) *Petitioner innocent party.* If the petitioner is not the one who in person committed the act which caused the seizure the petition should state how the property or carrier came into the possession of such other person, and that the petitioner had no knowledge, or reason to believe, if such be the fact, that the property or carrier would be used in violation of law.

(e) *Results of investigation.* The petition should also state what investigation, if any, was made of such other person, through principal Federal, State, or local law enforcement officers, to determine whether such other person had either a record or a reputation, or both, as a liquor law violator in a case involving a seizure for violation of the internal revenue laws relating to liquor; or as a violator in the field of commercial crime in all other types of seizures. The petition should further state the information obtained from said investigation, and whether such information was received before the petitioner acquired his interest in the property or carrier, or such other person acquired his right in the property or carrier, whichever occurred later. . . .

APPENDIX A

THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 88–499, August 30, 1964, 78 Stat. 615; as Codified by Public Law 89–554, Septembsr 6, 1966, 80 Stat. 388 in Title 5 U.S.C., Chaper 5, Subchapter III, Sections 571 through 576.]

§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board of commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendatio adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings; and the opinio and proposal so entered shall accompany the Conference recommendation in publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter fo carrying out the functions of the Conference, including the creation of suc

committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government:

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Governmnet, including responsibility for encouraging Federal agnecies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, using from time to time, as appropriate, experts and consultants who may be employed under section 3109 of this title, but at rates for individuals not in excess of $100 a day;

(11) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(12) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

There are authorized to be appropriated sums necessary, not in excess of $450,000 to carry out the purpose of this subchapter.

APPENDIX B

BYLAWS

Section 1. *Establishment and Objective*

In 1964 Congress enacted and the President signed Public Law 88-499, the Administrative Conference Act, 5 U.S.C. (1966) 571–576, authorizing the establishment of a new government organization to be constituted as a permanent, independent agency known as the Administrative Conference of the United States. Its purpose is to improve Federal agencies' administration of regulatory, benefit, and other programs. The statute provides for the membership of the Conference, its powers, duties, and organization.

Section 2. *Membership*

(a) *General*

Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any department, agency, or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(b) *Terms*

The terms of members appointed by the Chairman with the approval of the Council who are appointed prior to the first plenary session of the Conference shall terminate on June 30, 1970; and thereafter, the terms of members appointed by the Chairman with the approval of the Council shall terminate at two-year intervals from that date. Such members may be appointed for not more than three successive terms.

(c) *Eligibility and Replacement*

A member (other than a member of the Council) who is the head of or is designated by a Federal department or administrative agency or the head thereof shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the department or agency. Designations and re-designations of members shall be filed with the Executive Secretary of the Conference not less than 30 days prior to the first session of the Conference at which such member shall sit, except that for the first plenary session, and thereafter in exceptional circumstances, the Council may permit a newly designated or re-designated member to participate in any session.

A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) *Alternates and Substitutes*

Alternates or substitutes will not be permitted to act as members at plenary sessions of the Conference. Where circumstances justify, alternates or substitutes may be permitted to act in the place of members in the meetings or other activities of committees or subcommittees, with the approval and permission of the committee or subcommittee, with the approval and permission of the committee or subcommittee, but such alternates or substitutes shall not have the privilege of a vote in respect to any action of the committee or subcommittee.

Section 3. *Committees*

The following shall constitute the standing committees of the Conference and the areas as to which they normally will have primary responsibility. The activities of the committees shall not be limited to the areas described, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

(a) *Committee on Personnel*

Studies to enhance the competence, professionalism, and effectiveness of trial examiners, Government lawyers, and other personnel involved in the conduct of administrative proceedings, with attention to such matters as qualification, recruitment, appointment, assignment, rotation, training, compensation, promotion, and tenure, and studies relating to problems of ethics on the part of such personnel as well as others, whether or not in public employ, involved in administrative matters.

(b) *Committee on Agency Organization and Procedure*

Studies of the assignment and delegation within departments and agencies, of responsibility and authority affecting private rights and obligations, including such matters as administrative review of subordinate actions and separation of functions.

(c) *Committee on Informal Action*

Studies of the procedures, policies, and practices which affect private rights and obligations without hearings or other formal procedures.

(d) *Committee on Grant and Benefit Programs*

Studies of the procedures by which departments and agencies administer Federal loan, grant, and benefit programs, including procedures for denial or approval of applications, the imposition of conditions or limitations, and suspension or revocation of payments.

(e) *Committee on Rulemaking*

Studies relating to the definition, use, scope, and form of rulemaking procedures, including such matters as the extent and method of public participation and techniques for presenting relevant data and views.

(f) *Committee on Licenses and Authorizations*

Studies of procedures for the grant, denial, transfer, suspension, or termination of certification or other permission to engage in private activity which requires a Government license or other authorization, including such matters as the imposition of special conditions upon licensees and procedures upon the abandonment or alteration of the licensed activity.

(g) *Committee on Claims Adjudications*

Studies of procedures for the administrative determination of claims for money or property, including such matters as procurement contract procedures, reparations proceedings, proceedings arising out of damage to persons or property, and awards for the use of patents.

(h) *Committee on Compliance and Enforcement Proceedings*

Studies relating to compliance and enforcement policies, techniques, and procedures, including the issuance of cease and desist orders, the imposition of fines and penalties, and the application of other sanctions to assure compliance with applicable requirements.

(i) *Committee on Information, Education, and Reports*

Studies relating to the availability and dissemination of public information on administrative procedures, policies, and actions, and to the appropriateness of reporting requirements imposed upon private activities.

(j) *Committee on Judicial Review*

Studies of procedural problems relating to judicial review of administrative action, as well as to interlocutory judical inquiry or intercession.

Section 4. *Liaison with the Congress*

The President of the Senate and the Speaker of the House shall each be invited to designate from each Congress three members of the Senate and the House respectively who may participate in the deliberations of the Conference with privileges of the floor, but without vote.

Section 5. *Liaison with the Judiciary*

(a) The Chief Justice of the United States shall be invited every two years to designate three judges who may participate in the deliberations of the Conference with privileges of the floor, but without vote.

(b) The Administrative Office of the United States Courts and the Federal Judicial Center shall be invited to designate persons from those agencies to participate in the deliberations of the Conference with privileges of the floor, without vote.

Section 6. *General*

(a) *Meetings*

All sessions of the Assembly shall be public.

(b) *Quorums*

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(c) *Amendment of Bylaws*

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Executive Secretary.

(d) *Procedure*

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

APPENDIX C

COMPOSITION OF ADMINISTRATIVE CONFERENCE

	Number of Members	
I. The Council (5 U.S.C. 575(b)):		
1. Chairman	1	
2. Presidential Appointees	10	
		11
II. The Independent Regulatory Boards or Commissions (5 U.S.C. 573(b)(2)):		
1. Atomic Energy Commission	1	
2. Board of Governors of the Federal Reserve System	1	
3. Civil Aeronautics Board	1	
4. Federal Communications Commission	1	
5. Federal Home Loan Bank Board	1	
6. Federal Maritime Commission	1	
7. Federal Power Commission	1	
8. Federal Trade Commission	1	
9. Interstate Commerce Commission	1	
10. National Labor Relations Board	1	
11. Securities and Exchange Commission	1	
		11
III. Executive Departments designated by the President pursuant to 5 U.S.C. 573(b)(3):		
1. Department of State	1	
2. Department of the Treasury	2	
3. Department of Defense	2	
4. Department of Justice	1	
5. Post Office Department	1	
6. Department of the Interior	2	
7. Department of Agriculture	2	
8. Department of Commerce	1	
9. Department of Labor	1	
10. Department of Health, Education, and Welfare	2	
11. Department of Housing and Urban Development	1	
12. Department of Transportation	1	
		17
IV. Administrative Agencies designated by the President pursuant to 5 U.S.C. 573(b)(3):		
1. Bureau of the Budget	1	
2. Civil Rights Commission	1	

3. Equal Employment Opportunity Commission	1
4. General Services Administration	1
5. National Aeronautics and Space Administration	1
6. Office of Economic Opportunity	1
7. Selective Service System	1
8. Small Business Administration	1
9. United States Civil Service Commission	
(a) General representation	1
(b) Hearing examiner	1
10. Veterans Administration	1
	11

V. Members from the public sector (5 U.S.C. 573(b)(6)):

By the Chairman with the approval of the Council, not less than 28 nor more than 33 members from the public sector.

Under this authority, 32 public members have been appointed.

APPENDIX D

OPINION DEFINING INDEPENDENT BOARDS

Whereas, Section 4(b)(2) of the Administrative Conference Act (5 U.S.C. 573(b)(2)) provides that the membership of the Administrative Conference shall be composed, in part, of—

> "the chairman of each independent regulatory board or commission or an individual designated by the board or commission;" and

Whereas, The meaning of the term "independent regulatory board or commission" as it is used in said section must be established for purposes of identifying the agencies which will furnish Conference members under that subsection before the President can designate other agencies which will participate pursuant to section 4(b)(3);

Whereas, The word "independent" as applied to a board or commission, in its usual sense, means a board or commission which both (a) is free from direct control by the Executive in that it is not an agency of the President or of any of the twelve Cabinet Departments, and (b) is a separate establishment, not a component or subordinate unit or constituent agency within a larger agency.

Whereas, The word "regulatory," as applied to board or commission, in its usual sense, means a board or commission which (a) affirmatively prescribes and compels a desired pattern of operation, as distinguished from a board or commission which is limited to investigatory, advisory, or strictly adjudicatory functions, for (b) private activity, as distinguished from public or governmental functions, through (c) rulemaking and adjudication, as those terms are defined in 5 U.S.C. 551; and

Whereas, The term "board or commission" in its usual sense is intended to denote a multi-headed agency, as distiguished from an agency which is headed by a single administrator;

Now therefore be it resolved, That the Council construes the term "each independent regulatory board or commission," as it is used in section 4(b)(2), to mean the following administrative agencies:

Atomic Energy Commission
Board of Governors of the Federal Reserve System
Civil Aeronautics Board
Federal Communications Commission
Federal Home Loan Bank Board
Federal Maritime Commission
Federal Power Commission
Federal Trade Commission
Interstate Commerce Commission
National Labor Relations Board
Securities and Exchange Commission

By Direction of the Council,
/s/ JERRE S. WILLIAMS,
Chairman.

APPENDIX E

PRESIDENTIAL DESIGNATION OF AGENCIES

Dear Mr. Chairman:

Pursuant to the authority contained in 5 U.S.C. § 573(b)(3) of the Administrative Conference Act, I hereby designate the following Executive Departments and Administrative Agencies to have membership in the Conference:

Executive Departments
- Department of State
- Department of the Treasury
- Department of Defense
- Department of Justice
- Post Office Department
- Department of the Interior
- Department of Agriculture
- Department of Commerce
- Department of Labor
- Department of Health, Education, and Welfare
- Department of Housing and Urban Development
- Department of Transportation

Administrative Agencies
- Bureau of the Budget
- Equal Employment Opportunity Commission
- General Services Administration
- National Aeronautics and Space Administration
- Office of Economic Opportunity
- Small Business Administration
- United States Civil Service Commission
- Veterans Administration
- Civil Rights Commission
- Selective Service System

Sincerely,
Lyndon B. Johnson.

HONORABLE JERRE S. WILLIAMS
Chairman
Administrative Conference of the United States
Washington, D.C. 20506
March 9, 1968

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